(26,289)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 822.

THE SUPERIOR & PITTSBURG COPPER COMPANY, PLAINTIFF IN ERROR,

vs.

FRANK TOMICH, SOMETIMES KNOWN AS FRANK THOMAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARIZONA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 29, 1918.

a In the Supreme Court of the State of Arizona.

Cause No. 1535.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Appellant,

vs.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Appellee.

TRANSCRIPT OF RECORD.

Appearances:

For the Appellant and Plaintiff in Error: Cleon T. Knapp, James P. Boyle, Harry E. Pickett.

For the Appellee and Defendant in Error: Fred Sutter, J. T. Kingsbury.

1 In the Superior Court of the State of Arizona in and for Cochise County.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Plaintiff,

vs.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Defendant.

Complaint.

Plaintiff complains of defendant and for cause of action alleges:

I.

That plaintiff is a resident of Cochise County, State of Arizona; and that he is sometimes known by the name of Frank Thomas, but that his true name is Frank Tomich; that the defendant is a corporation doing business under the laws of the State of Arizona.

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II.

That the defendant at all the times mentioned herein owned, operated and worked a mine situated in the Warren Mining District, Cochise County, State of Arizona, which said mine is known as the Cole Shaft or Mine.

III.

That on or about the 9th day of November, 1914, the plaintiff for a consideration was employed by the defendant to work under

ground in said mine: That one of the duties plaintiff was to perform, by virtue of such employment, was to load, unload, dump, handle, push and operate certain ore cars in said mine: That while plaintiff was handling, pushing and operating one of said ore cars, in the due course of his said employment, in a certain drift connected with said Cole Shaft, and on the Nine Hundred (900) foot level thereof, plaintiff's right hand was caught between said car and one of the timbers in said drift and said hand was thereby mangled, bruised and injured and the first three fingers of said hand were so badly bruised, mangled and injured that they were severed, removed and cut off, and that because of such injury to said hand and the loss of said three fingers the use of plaintiff's right hand has been wholly lost and plaintiff has, thereby, been incapacitated from earning a living.

IV.

That said right hand of plaintiff and said three fingers were caught between said car and timbers and injured, as afore-
3 said, without any negligence on the part of plaintiff.

V.

That said injury to said hand and to said three fingers was caused by an accident arising out of and in the due course of said labor, service and employment then and there engaged in by plaintiff for the defendant, as aforesaid, and was due to a condition or conditions of such occupation or employment; and that said injury to said hand and to said three fingers happened in the due course of plaintiff's employment for defendant and while plaintiff was in the performance of his duty under such employment, to-wit: pushing, moving, loading, unloading, dumping, operating and handling ore cars in said mine owned, operated and controlled by defendant.

VI.

That said defendant did not itself, nor did any of its agents, inform plaintiff nor any of its other employes engaged in like occupation, by rules, regulations or instructions, as to the duties and restrictions of his employment to the end of protecting plaintiff and said other employes in his said employment.

VII.

That plaintiff at the time of said accident was an able-bodied man of the age of twenty-nine (29) years and was capable of earning and did earn the sum of four dollars ($4) per day: That
4 by reason of said injury his earning capacity has been greatly diminished and lessened.

VIII.

That as a result of said accident and injury plaintiff suffered great mental and physical pain.

IX.

That by reason of said accident and said injury plaintiff has suffered damages in the sum of Fifteen Thousand Dollars ($15,000).

Wherefore, plaintiff prays judgment against the defendant for the sum of Fifteen Thousand Dollars ($15,000) and for his costs and disbursements expended herein.

FRED SUTTER,
Attorney for Plaintiff.

For a further and separate cause of action against the defendant the plaintiff alleges as follows:

I.

That plaintiff is a resident of Cochise County, State of Arizona; and that he is sometimes known by the name of Frank Thomas, but that his true name is Frank Tomich: That the defendant is a corporation doing business under the laws of the State of Arizona.

II.

That the defendant during the times herein mentioned was engaged in the business of mining in the Warren District, Cochise County, State of Arizona: That in the course of said business and on or about the 9th day of November, 1914, the defendant owned, operated and worked what is known as the Cole Shaft or Mine, in said District.

III.

That on or about the said 9th day of November, 1914, the plaintiff was employed by the defendant for a valuable consideration as a laborer in its said mine in said District: That his work consisted partly in running, loading, unloading, pushing, dumping and operating ore cars in said mine.

IV.

That on said 9th day of November, 1914, in the due and proper performance of his duties, under and by virtue of such employment, the plaintiff was handling and operating one of said ore cars, which was loaded with ore, on a track in a drift or tunnel connected with said Cole Shaft of said mine on the nine hundred (900) foot level

thereof. That said track in said drift or tunnel was laid on a steep grade and incline and ran toward and in the direction of a certain ore chute, into which chute plaintiff was to dump the ore contained in said car: That around said chute and above the same were certain timbers in close proximity to said chute: That because of the steep grade and incline of said track running toward said chute, it was impossible to hold back and retard the speed of said ore cars, when loaded with ore. That said car that plaintiff was handling and operating, as aforesaid, was loaded with heavy ore, and without any fault or negligence of said plaintiff, ran
6 down said track on said steep grade and incline in said drift at a high rate of speed and ran against one of the timbers around said chute and suddenly dumped and turned over and caught plaintiff's right hand between said car and one of said timbers and crushed, bruised and mangled said hand and crushed and bruised the first three fingers of said hand in such a manner that the same were removed and cut off.

V.

That said defendant carelessly and negligently kept and maintained said track in said drift, and said timbers, at a steep and dangerous grade and incline, and carelessly and negligently placed said timbers around and above said chute in such a manner as not to protect plaintiff in his work, and that defendant failed to have, keep and maintain said drift, tunnel, track and chute in a reasonably safe condition and carelessly and negligently failed to have, keep and maintain the place in which plaintiff was working in a reasonably safe condition; and that said accident and injury to plaintiff was caused solely through the negligence and carelessness and wrongful acts and ommission of defendant and its servants and without fault or negligence on the part of plaintiff.

VI.

That plaintiff can speak and understand but little of the English language and at the time of said accident plaintiff was an inex-
perienced miner and relied on the defendant to instruct and
7 protect him in his employment and to furnish him with a reasonable safe place within which to work.

VII.

That said defendant did not itself, nor did any of its agents ever inform plaintiff, nor any of its other employes engaged in like occupation, by rules, regulations, or instructions as to the duties and restrictions of his employment, to the end of protecting plaintiff and said other employees in their said employment.

VIII.

That said plaintiff is a married man, with a wife and three small children, dependent on him for support and that prior to said injury plaintiff was an able-bodied man, capable of earning and did earn Four Dollars ($4.00) per day: That plaintiff is twenty-nine (29) years old.

IX.

That by reason of said injury plaintiff suffered great physical and mental pain and anguish.

X.

That on account of said injury plaintiff has become incapacitated to earn a livelihood and to support his said family and his earning capacity has been greatly diminished and decreased.

XI.

That because of said injury defendant has damaged plaintiff and plaintiff has suffered damages in the sum of Fifteen Thousand Dollars ($15,000.00).

8 Wherefore, plaintiff prays judgment against the defendant for the sum of Fifteen Thousand Dollars ($15,000) and for his costs and disbursements expended herein.

FRED SUTTER,
Attorney for Plaintiff.

Filed Feb. 20, 1915.

(Title of Court and Cause.)

Fourth Amended Answer.

Comes now the Superior & Pittsburg Copper Company, defendant above named, and for its fourth amended answer to the complaint herein, alleges:

Demurrer.

I.

That the complaint shows that plaintiff seeks to recover judgment against defendant under and by virtue of Chapter VI, of Title XIV, of the Revised Statutes of Arizona, 1913, known as the "Employers' Liability Law," and Section 7 of Article XVIII of the Constitution of the State of Arizona, and that said Employers' Liability Law, and said section of the Constitution of Arizona are both unconstitutional and void, in that said provisions are contrary to and contravene the

Fourteenth Amendment to the Constitution of the United States, in that said provisions deprive the defendant of its property,
9 without due process of law and denies to it the equal protection of the law, by subjecting it to unlimited liability for damages for personal injuries suffered by its employes without any fault or negligence on the part of the defendant causing such injury or contributing thereto, and therefore that plaintiff's complaint fails to state facts sufficient to constitute a cause of action against defendant.

II.

That it appears on the face of said complaint that plaintiff seeks to recover judgment against defendant under and by virtue of the provisions of Chapter VI, of Title XIV, of the Civil Code, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and that said Employers' Liability Law is in violation and contravention of the Constitution of the State of Arizona, and particularly of Sections 5 and 7 of Article XVIII thereof, in that said Employers' Liability Law attempts to give plaintiff the right to recover damages of defendant in this action notwithstanding that the injuries for which said damages are claimed, were contributed to and in part caused by plaintiff's own negligence, and attempts to deprive the defendant of the right to wholly defeat this action by showing that said injuries were contributed to and in part caused by plaintiff's own negligence and that for the reasons in this demurrer set forth said complaint does not state facts sufficient to constitute a cause of action against defendant.

10 Wherefore defendant prays judgment as to the sufficiency of said complaint and for its costs.

KNAPP & D'AUTREMONT,
H. E. PICKETT,
Attorneys for Defendant.

And further answering plaintiff's complaint herein, though not waiving any defense, or defenses hereinbefore interposed, defendant denies, admits and alleges as follows:

I.

Admits the allegations of paragraphs I and II as set forth in said complaint: and denies each and every allegation contained in said complaint, as alleged, except as herein admitted or otherwise qualified; and denies each and every allegation contained in paragraphs numbered III, IV, V, VI, VII, VIII and IX.

II.

Alleges that if the plaintiff has suffered any injury, either as alleged in the complaint or otherwise, which is not admitted but is

expressly denied, such damage or injury wholly resulted from, and was wholly caused by, plaintiff's willful neglect and carelessness and his failure to use any care or caution in his own behalf at the time and place of said alleged injury.

III.

That the alleged injury or injuries, either as alleged in the
11 complaint or otherwise, were contributed to, and in part caused by plaintiff's own negligence in this, that plaintiff was giving no attention, or insufficient attention, to his duties as a car man, and for that reason failed to push his car in a proper manner, or place or hold his hands in a proper position on said car, that he failed to dump his car at a certain chute, in a proper manner; that because plaintiff was then and there holding his hands in an improper position and place, on said car, and because of the reckless and negligent manner of pushing and dumping his said car, plaintiff's right hand was caught between the said car and the protecting bar of said chute; and in other respects plaintiff was guilty of negligence contributing to his injury.

Wherefore defendant prays judgment of the Court that plaintiff take nothing by his action, but that his complaint be dismissed, and for its costs.

KNAPP & D'AUTREMONT,
H. E. PICKETT,
Attorneys for Defendant.

Filed Feb. 15, 1916.

12 (Title of Court and Cause.)

Reporter's Transcript of Evidence.

FRANK TOMICH, Plaintiff, being called as a witness in his own behalf, and having been duly sworn according to law, through the interpreter, testified as follows:

Direct examination.

By Judge Sutter:

Q. You may state your name.
A. Frank Tomich.
Q. Have you ever gone under any other name?
A. Yes, Frank Thomas.
Q. Why did you go under the name of Frank Thomas?
A. It is easier written.
Q. What is it?
A. It is easier written.
Q. Are you acquainted with the Superior and Pittsburg Copper Company, a corporation, the defendant in this action?

A. Yes, sir.
Q. What is your occupation?
A. Carman and miner.
Q. How long have you been a carman and miner?
13 A. Three years.
Q. Where were you working on the 9th day of November, 1914?
A. Cole shaft, nine hundred level.
Q. The Cole shaft. That is owned by this defendant.

Judge Sutter: That is admitted any way in this complaint.
Mr. d'Antremont: Yes.

Q. How long had you worked for the defendant?
A. Three years.
Q. What were you doing on the morning of the 9th of November?
A. I was pushing a car.
Q. For whom, this defendant?
A. Yes, sir.
Q. On the nine hundred level of the Cole shaft?
A. Yes, sir.
Q. Was it under ground?
A. Yes, sir, under ground.
Q. How long—What, if anything, unusual happened to you on the morning of the 9th of November in the course of your employment?

Mr. d'Antremont: If the interpreter can't repeat all of that verbatum, would rather have the witness stopped.
The Court: Yes, ask him to repeat part of it at a time.

The Witness: I was pushing a car, and as I was walking pretty fast, I slipped.
Q. What happened then?
14 A. When I was trying to hold on to the car and going pretty fast, and the car dumped and caught my fingers between the timber and the car.
Q. Between the timber and the car?
A. Yes sir.
Q. What was the condition of the track at the place where this accident happened on the 9th on the nine hundred foot level?
A. The grade of the track was sloping down hill, down grade and there was no planks to walk on.
Q. Yes?
A. Only the ties.
Q. Now, which fingers, which of your fingers were caught between the car and the timber?
A. The three first fingers on the right hand.
Q. Three first fingers?
A. Three first, first fingers on the right hand.
Q. How long had you been working that morning when this accident happened?

A. Up until nine o'clock.
Q. What time did you go to work?
A. Seven-thirty.
Q. Now, will you describe to the jury how you were handling that car at the time the accident happened?
A. I was holding on to the car with my hands.
Q. Holding on to the car with your hands on to the rear end of the car, I suppose?

Mr. d'Antremont: Don't lead him.

15 Q. Well, on what part of the car were your hands?
A. On the middle of the car in the back.
Q. Were you handling this car the same as you handled other cars?

Mr. d'Antremont: We object to that as leading.
The Court: Objection overruled.
The Interpreter: What was the question.

Q. Were you handling this car the same as you had handled other cars?
A. Yes sir.
Q. Who furnished you that car?
A. The company.
Q. Now, at the time—I will withdraw that. He said the car dumped. At the time the car dumped—I withdraw that. Immediately after the car dumped, where were the hind wheels of the car? Describe their position?
A. Up in the air.
Q. Where was your body immediately after the car dumped?
A. I was hanging to the car. I was up in the air too.
Q. On what was your body resting?
A. I was hanging to the car.
Q. Where was your right hand?
A. Between the car and the plank.
Q. Between the car and the plank?
A. Yes sir.
Q. How long did you remain in that position?

16 Mr. D'Antremont: Did you say "a plank" or "the plank."
The Interpretr: "The" I understand.
Judge Sutter: Ask him the question again.

(Question repeaed by the Interpreter.)

The Interpreter: He says the hand was right between the car and the plank.
The Court: What plank?
The Interpreter: The plank that was above this.
The Court: Ask him the question.
The Witness: The plank that was above the chute; up above the chute.

Q. How far was that plank from the ground?
A. Between four and five feet.
Q. How long did you remain in the position, with your hand caught between the car and the plank?
A. No, about twenty minutes, I suppose.
Q. Was any one else present when the accident happened?
A. No sir.
Q. How did you release yourself from that position?
A. With my left hand, I pulled the car backwards, and that got my fingers loose.
Q. Then what did you do after you had released your fingers?
A. I sit down for about ten minutes or so.
Q. Why did you sit down?
A. I didn't know what else to do.
17 Q. Then what did you do?
A. I started to go towards the switch, and then I met a fellow passing by, and I met the shifter next, and he took me to the station.
Q. Then what happened?
A. He tied my hand, and he sent me up on top.
Q. Then what did you do?
A. I went to the watchman and changed my clothes, and they sent me to the hospital.
Q. What hospital did they send you to?
A. C. & A. Hospital.

Judge Sutter: Now, it is admitted that the C. & A. Hospital is the same as the Superior and Pittsburg Hospital?
Mr. d'Antremont: Yes.
Judge Sutter: Let the record show they are the same hospital.

Q. After you got to the hospital, what did they do to you?
A. They fixed my hand; treated my hand.
Q. Who treated your hand?
A. Dr. Bledsoe and Dr. Patton.
Q. After they treated your hand, what did you do and where did you go?
A. I stayed right there in the hospital.
Q. How long did you remain in the hospital?
A. Five days.
Q. After the five days that you remained in the hospital, where did you go?
18 A. I went home.
Q. After you went home, did you return to the hospital, or the company's dispensary for further treatment?
A. I went to the Bisbee dispensary for treatment.
Q. By "Bisbee dispensary", what do you mean, the company dispensary?
A. Yes sir, company dispensary.
Q. For how long a time did you go to the dispensary for further treatment?

A. One month and twenty-four days.
Q. After the expiration of one month and tewnty-four days, did you go to work?
A. Yes sir.
Q. Where did you go to work?
A. Cole shaft.
Q. For the defendant?
A. Yes sir.
Q. How long did you work?
A. Two hours and a half.
Q. Why didn't you work longer?
A. I could not because my hand pained.
Q. Have you done any other work, or followed your occupation as miner and carman since this accident happened?
A. No sir?
Q. Why not?
A. Because I could not work.
19 Q. Why couldn't you work?
A. Because my hand pained me so that I could not work.
Q. What effect, if any, has the injury on the first three fingers of your right hand had upon your system?

Mr. d'Autremont: I object to that, it not being alleged in the complaint of any other injury, and there is no other issue here except the man's fingers.
Judge Sutter: All damages resulting therefrom, and I have alleged physical pain and suffering, and he has a right to describe it.
Mr. d'Autremont: As to his fingers.
Judge Sutter: There is a world of authorities on that. I have them right here if the Court wants to see them.
20 The Court: The physical pain and suffering resulting from the injury to the plaintiff is admissible whether directly to the fingers or not. The objection will be overruled.

Q. Describe—I will change the form of the question. Describe the effect the injury to the first three fingers of your right hand had upon your system?
A. It pained me just like if needles were in it, and also my whole right arm.
Q. What, if any effect has it had upon your sleep at night?
A. I could not sleep either.
Q. Now, stand up before the jury, and show them your right hand.

(The witness now stands up before the jury, and exhibits his right hand.)

Judge Sutter: Now if the jury wants to touch the ends of those fingers, press on them hard, I desire them to do so.

(The different members of the jury touch the witness'es fingers on the right hand, and the witness flinches each time the ends of his fingers are touched.

21 Q. How old are you—How old were you on the date this accident happened to you?
A. Thirty years old.
Q. What wages were you earning on the date this accident happened to you?
A. Three seventy-five.
Q. Was that the average wages paid miners at that time?
A. At that time most of them got three seventy-five and four.
Q. Have you been able to earn those wages since the date of the accident?
A. No sir.
Q. Why not?
A. I could not work.
Q. Why couldn't you work?
A. Because my hand pained me.
Q. Which hand?
A. Right hand.
Q. Have you consulted any other doctor or physician since the date of this accident, other than Dr. Bledsoe or Patton?
A. I saw Dr. Hawley.
Q. About what time, if you remember, did you consult Dr. Hawley?
22 A. The month of June.
Q. Last year?
A. Yes sir.
Q. Did he examine your right hand?
A. Yes sir.
Q. How long before did you consult him concerning your hand?
A. About twenty-two days.
23 Q. What did he tell you?

Mr. d'Autremont: I object to that.

Q. After examining your hand?

Mr. d'Autremont: I object to that as incompetent, irrevelant and immaterial.
The Court: Objection sustained.

Q. Has any other doctor examined your hand other than Hawley, Patton and Bledsoe?
A. He says no other doctor.
Q. Don't say "he says." Answer the question.
A. Another doctor, but I don't know his name.
Q. Has any doctor here in Tombstone examined your hand?
A. No sir.

Judge Sutter: Probably I didn't explain it to him it was a doctor that examined him.

Q. Did anybody examine your hand yesterday?
A. No sir.

Q. Yesterday afternoon immediately after you came to Tombstone, did any one call at the hotel and examine your hand?
A. No sir.

Judge Sutter: Well, that is immaterial. We will have it examined again, and I will tell him it is a doctor. That is all for the present.

24 The first job I had was mucker in the Lowell mine, for the Copper Queen at the Gardner or Lowell. I had held that job 5 months, then was a carman and mucker at the Lowell so I had been a carman about 5 years and a half. I weigh about 180 pounds. I do not feel pretty strong now. I pushed my car continuously for 5 years, except a year off when I could not get work. I am from Austria. I went to Michigan first. I worked there 5 years, so I have worked altogether in this country eleven years. In Michigan I was fixing track in the mines and also pipeman. I learned only a little English in Michigan. I don't know when I went to work in the Cole. I don't know how long I worked or when I went there. Three years I worked there. I was a carman all the time. I was not on the 900 level when they opened it up. I worked on the 900 level all the time I was there. I worked as miner and carman. I was not familiar with this part of the 900 level on November 9th, 1914, the date of the accident, because that was the first shift I worked in that place. I was dumping ore down the chute. I dumped about seven or eight cars. I got the ore from the chute, the same chute each time and dumped it down the same chute each time. I don't know how many trips I made over this track that morning.

The track was straight and down a hill. The down hill part started a little ahead of the chute from which I loaded.

Q. About how much down hill was that chute?

The Interpreter: I don't think that he understands the question. Ten or twelve feet. You want to know how much descent grade it was.

25 The Court: Cross examine.

Cross-examination.

By Mr. d'Antremont:

Q. When did you come to this country?
A. About six years.
Q. Did you understand me when I said that?
A. No.
Q. Did you understand that last question?
A. No.
Q. You speak a little English?
A. Very little.
Q. Where did you live the last six years?
A. Bisbee.

Q. Did you live in Bisbee the entire six years?
A. Yes sir.
Q. What were you doing during those six years?
A. I worked as a carman and a miner.
Q. What was the first job you ever had?
A. Mucker.
Q. Where?
A. In the Lowell Mine, for the Copper Queen, Gardner; I don't know whether it is Lowell or Gardner.
Q. How long did you hold that job?
A. Five months.
Q. And then what job did you have?
26 A. Then at the Lowell.
Q. And what did you do there?
A. Carmen and mucker.
Q. Have you been a carman, then for about five years and a half?
A. Yes sir.
Q. How much do you weigh, Mr. Tomich?
A. One hundred and eighty pounds.
Q. You are a pretty strong fellow, ain't you?
A. Not now.
Q. Do you feel pretty weak now?
A. Yes sir.
Q. Did you push your car repeatedly and continuously during that five years?
A. No sir.
Q. How much of the time were you off?
A. A year; one year.
Q. What did you do during that year?
A. I could not get work.
Q. What province did you come from?
A. I am from Austria.
Q. Did you come direct to Bisbee?
A. No, Michigan.
Q. Did you work in Michigan?
A. Yes sir.
27 Q. How long were you there?
A. Five years.
Q. So altogether, you have been in this country about ten years?
A. Eleven years altogether.
Q. What kind of work did you do in Michigan?
A. I was fixing track in the mines, and also pipeman.
Q. Pipeman?
A. Yes sir.
Q. Then you have had ten years' experience in mines?
A. Yes sir.
Q. You learned a little English in Michigan?
A. No sir, not hardly any.
Q. When did you go to work in the Cole?
A. I don't know; I have forgot.
Q. Well, about how long did you work in the Cole shaft?

A. I don't know how long I worked, or when I went to work.
Judge Sutter: How long?
Q. When he went to work?
A. Three years.
Q. How long were you a carman in the Cole shaft?
A. I was pushing a car all the time.
Q. Were you on the nine hundred level when they opened it up?
28 A. No sir.
Q. How long were you on the nine hundred level?
A. I worked there all the time while I was there.
Q. Did you ever do anything on the nine hundred level in the Cole shaft except carman?
A. Yes, I worked as a miner, and a carman also.
Q. You were familiar with this part of the nine hundred level where this accident happened on November 9th, 1914?
A. I didn't, because that was the first shift I worked in that place.
Q. This was the first shift you ever worked? Were you dumping ore down the fifty-four chute?

Judge Sutter: If he knows the number of it.
Mr. d'Antremont: Yes, cut out "fifty-four" and say "where the accident happened; the chute where the accident happened"?

The Witness: Yes sir.
Q. And how many cars had you loaded that day?
A. About seven or eight.
Q. Where did you get this ore?
A. From the chute.
Q. Did you get this ore from the same chute each time?
A. Yes sir.
Q. And dumped it down the same chute each time?
A. Yes sir.
Q. So you had made about fifteen trips over this same track that morning?
29 A. I don't know how many.
Q. Was the track straight from the chute where you loaded your car to the chute where you dumped your car?
A. It was down hill; straight down hill.
Q. Where did this down hill part start?
A. Just a little ahead of the chute.
Q. Which chute?
A. Which chute?
Q. Yes?
A. A little ahead of the chute I loaded; where I was loading.
Q. That you were loading from or loading into?
A. Loading from.
Q. About how much down hill was that chute?

The Interpreter: I don't think that he understands the question. Ten or twelve feet. You want to know how much de-cent grade it was.

Q. Yes. Strike it out. About how steep was the grade of the track from this chute?

A. It was quite a bit below.

Q. Did you have to start pushing *tou* car at this chute?

A. I had to push it a little to start.

Q. After you got it started, did you have to hold it back, or did you have to keep pushing it?

A. I had to walk pretty fast, this way (indicating) with the car.

Q. Did you have much trouble pushing the empty car back from the chute where you dumped the ore into?

30 A. Not very hard.

Q. Will you tell what the track looked like from the chute where you loaded to the chute where you dumped?

A. It looked like it was level, and there was nothing to walk on. There was ties to walk over.

Q. How high off the ground were the ties?

A. They are level with the ground.

Q. Then there was dirt between the ties?

A. Yes sir.

Q. So there was a smooth place to walk, as you walked along?

A. It was level.

Q. Well, was this nine hundred level wet or dry?

A. It was dry.

Q. What did the track—cut that out. Was there a track—cut that out. Was there a cross-cut running into the drift at right angles?

A. Yes sir, there was one.

Q. Was there a track in that cross-cut?

A. Yes sir.

Q. Where those two tracks met, what did the floor look like?

A. There was no floor.

Q. What was there where the tracks met?

A. There was a space where you turned the car.

Q. What was in that space?

A. A switch there, that runs the car by from both drifts.

31 Q. Where the switch was, was it dirt on the floor or something else?

A. It was dirt.

Q. How did that switch—you are sure there was nothing there where the tracks met, except the ties or track and the floor?

A. Nothing else.

Q. What did you slip on?

A. On the rail.

Q. What were you walking on? How did you—were you walking between the rails?

A. Yes.

Q. About how far from the chute were you when you slipped?

A. About ten feet.

32 Q. How did you fall?

Judge Sutter: We object. There is no evidence that he fell.

The Court: The objection is overruled.

Judge Sutter: We object; there is not a bit of testimony in the record that he fell.

The Court: There is no testimony that he fell to the ground, but there is testimony that he slipped and fell.

Judge Sutter: No, the testimony in this record is that he slipped on the rail.

The Court: Objection overruled.

Mr. d'Autremont: Read the question.

33 (Question read by the Reporter, as follows: "How did you fall?")

The Witness: Fell against the car, and the car turned over.

Q. What were you doing—cross that out. In what position were you between the time you slipped and the time you fell?

A. Do you want me to get up and show?

Q. Yes?

(The witness now gets up and indicates his position.)

A. I fell right over the car.

Q. Were your feet dragging on the ground as the car was rolling along?

A. No sir, my feet were on top.

Q. Were you riding on the car?

A. I just hung to the car when it caught my fingers.

Q. Did you go down on your knees when you first slipped?

A. No sir.

Q. Did you continue to walk from that time until the car turned up?

A. I could not walk. The car took me with it.

Q. From the time you slipped until the car took you with it, how long a time was it? Did it all happen at once?

A. Yes sir, it all happened at once.

Q. Well, then, what position was your body in during this ten feet from the place where you slipped until the car turned up at the chute?

A. I was hanging to the car.

Q. Were you walking.

34 A. No sir.

Q. What were you doing?

A. I was hanging to the car.

Q. Where were your feet?

A. My feet were up in the air.

Q. When did your feet leave the ground at the chute, or back there ten feet?

A. As soon as I slipped, my feet—I hung right to the car and my feet went up in the air.

Q. Did you slip after you passed over the switch?

A. Before I come to the switch.

Q. Where were your feet as you were passing over the switch?

A. They were on the ground then.

Q. When did they leave the ground?
A. When I slipped.
Q. How fast were you going with the car?
A. Just like I usually do; going pretty fast.
Q. You usually push the car pretty fast?
A. The same as anybody else.
Q. You were pushing the car at the time you slipped?
A. When I slipped the car went by itself.
Q. Did it jerk you?
A. The car held me up in the air.
Q. Did your knees drag?
A. No sir.
Q. Did you say you slipped before you come to the switch?
A. Before I came to the switch.
Q. Now, just tell what you were doing between the time you slipped and when the car upended.
35 A. I don't do nothing.
Q. In what position was your body ?
A. It was up in the air.
Q. Was it straight out?

Judge Sutter: Now, if your Honor please, that question would be all right to ask of you or me to state where your body was but of this witness it is different.

Mr. d'Autremont: Anything to bring out the facts.

Judge Sutter: I think counsel wants to bring out the facts, and I want to assist in bringing out the facts. When he says "where was your body," he does not know anything about the time. I know what it is to talk to this witness.

The Court: Answer the question if you can. If you don't understand it you can say so.

The Witness: I was hanging on the car when I slipped, I had to hang on the car, and then the car run around pretty fast, and hit the chute, and turned over.

Q. How were you hanging on the car?
A. I was hanging up to the car.
Q. Had you thrown your lever over that dumps the door?
A. I pushed the car to loosen my hand, and I pulled the car backward.
Q. That is not what I wanted. When did you throw your lever? Ask that much? Did you throw your lever that opens the door of the car?
A. I don't know.
Q. When you are dumping the car, when did you throw your lever to open the door?
36 A. Right in front of the chute.
Q. Did you wait until it gets stopped?
A. I opened before it stops.
Q. But you don't remember if you had opened it at this time?
A. No.

Q. About how far away from the chute do you generally throw it?
A. How far I throw the lever?
Q. Thrust the lever over?
A. Seven or eight feet.
Q. Will you explain again how your right hand was when the car tipped up?
A. My hand was on top of the car, and got caught between the car and the plank.
Q. You mean the plank which are called the protective bars?
A. He says there was no protection plank. Just the plank there, I don't know whether it is protection.
Q. It is a plank between the two timbers on each side of the chute?
A. Yes, it is a plank nailed to both of the timbers.
Q. When you usually dump your car, does any part of the car hit those plank?
A. Yes sir, it hits the plank in order not to go down the chute; for the car not to go down the chute.
Q. You mean that the top plank is hit by the car each time that you dump it?
A. Yes sir.
37 Q. What part of the car does the plank hit each time it dumps?
A. The back part of the car.
Q. Where your hand was at that time?
A. Yes sir.
Q. The back edge?

The Interpreter: The back edge, yes sir.

Q. Ask him if it is the back edge?
A. Yes sir, the back edge.
Q. Whenever you dump your car, how do you dump it?
A. I press the lever to the left, and the car turns up.
Q. Do you have to lift the car from the back to dump it up?
A. No sir.
Q. You just throw your lever and the car dumps itself?
A. Yes sir.
Q. To do that, how fast do you shove your car?
A. It would take two or three minutes to empty the car.

Mr. d'Autremont: What is that?

(Answer read by the Reporter, as follows: "It would take two or three minutes to empty the car."

Mr. d'Autremont: Ask him that question again.

(Question repeated by the Interpreter.)

A. I go fast.
Q. You never have to pull your car to dump it, do you?
A. No sir.

Q. What stops the car from going down into the chute?
38 A. That plank.
Q. Which plank? Where is the plank that stops the car from going down the chute?
A. Down under ground.
Q. What is the name of that plank.
A. I don't know the name of the plank, but it is as thick as a tie; a railroad tie.
Q. Did you ever hear it called a "bumping plank"?
A. No.
Q. What part of the car does that hit?
A. Front part.
Q. The wheels or the upper part of the car?
A. Wheels.

Mr. d'Autremont: I would like to ask your honor if there is any objection to having this witness demonstrate on this case how he dumps it. I will qualify him by saying that this is exactly the same type of car.
The Court: You are sure it is the exact kind of car?
Mr. d'Autremont: Exactly the same type of car in every respect.
The Court: Any objection?
Judge Sutter: If Your Honor please, there is no objection on the ground that probably there might be some little difference in the car, but a demonstration, in order to be complete before this jury, and not be misleading and unfair probably to the defendant as well as to the plaintiff, would have to have all of the same conditions as they existed there. A track running down the same grade, those cross timbers, that bumping plank at the bot-
39 tom, and that chute, and the conditions would all have to be the same. In other words it was not the car that caused the accident. If that timber had not been there, the accident would not have happened. For that reason, I would have to object unless the same conditions could be presented to this jury as existed at that time.
The Court: I can't see——
Mr. d'Autremont: Now if bringing the car in and showing the performance in dumping the car. It is identically the same kind of car. I don't think it is the same car myself. It is not the same.
Judge Sutter: It is not the same car.
Mr. Pickett: It is like the car.
Judge Sutter: I have worked in the mine, and I know that no two cars in the mine are the same.
The Court: You will have to show first that it is the same car.
Mr. d'Autremont: I understand that the demonstration is not proper?
The Court: If you can introduce the objects, and show the condition that this particular car was in, you can admit it.
Judge Sutter: I have no objection to that.
The Court: A certain car described by this witness. I think you might use the same kind of car.

Judge Sutter: Before they do that, I want to ask this witness a question or two.

The Court: The other points described by this witness, could not be demonstrated.

Judge Sutter: So far as the dumping of the car is concerned, I can't see how he can demonstrate it with this car, and show how the accident happened the slipping and the end striking the timber. You can't do that without all of those things being here.

The Court: Do you make any objection to their using this?

Judge Sutter: Yes, it would be defensive matter.

The Court: It seems to me it is defensive matter.

Mr. d'Autremont: I want this witness to show how it happened.

Judge Sutter: I won't make any technical objections to certain demonstrations, and I would not make any objection if the conditions were the same, but to show how the car is ordinarily dumped, I have no objection.

The Court: The Court, at the proper time, will allow any reasonable demonstration, to be made where the conditions can fairly be introduced. I can see how, if this is the same car, if not the same kind of car, without the conditions that existed at that time, would hardly be proper.

Mr. d'Autremont: We are asking to show how this man dumped this car, whether at this chute or any other chute.

Mr. Pickett: The demonstration can be done later. We don't particularly insist on it now.

Q. Where was your left hand at this time, Mr. Tomich?

A. On the side of the car.

Mr. Pickett: Did he say his left hand?

The Interpreter: On the side of the car.

The Court: Do you mean the side or the back of the car?

Judge Sutter: Ask the question that the Court has asked.

The Witness: Back, on the left side of the car.

The Court: You mean you had your hands flat against the back of the car, pushing it with your left hand?

The Witness: Yes sir.

Q. What were you pushing it for?

A. Because I had to push it; push the car to get the car to go.

Q. You mean at this particular time you had to push the car to make it go?

A. At the time I got hurt, I had to pull the car back in order to get my hand loose.

Q. Yes, but before you got your right hand caught, where was your left hand?

A. I kept my hand on top, on the left side. On the top of the back end of the car.

Q. How far apart were your two hands when your right hand got caught?

A. About a foot.

Q. Can you explain how your left hand did not get caught?
A. When I slipped my left hand jerked off of the car.
Q. Did you put it back on again?
A. No, I could not.
Q. Well, where was it when your right hand was caught?
A. On my side.
Q. So that when the car hit the dump, you had hold of the car with but one hand?
A. Yes I had hold of it with one hand.
Q. Well, if you had slipped ten feet back, why didn't you let go of the car?
42 A. I could not, because I could not see how far I was.
Q. Where was your head?
A. I could not see.
Q. Where was your head?
A. My head was up. I was looking around for light.
Q. After you slipped.
A. Yes sir, after I slipped.
Q. Will you show the jury just what position you were in before the back of the car started pulling you up in the air, off of your feet as you have stated.
A. I was hanging like that to the car. (Witness now indicates his position.) And my feet slipped and dragged with the car.
Q. How far did it drag you?
A. About ten feet.
Q. Were your knees bumping the ground?
A. No sir.
Q. Were your feet dragging?
A. No.
Q. Were you walking?
A. No, I was hanging.
The Court: Do you mean you were hanging on to the car with your feet off the ground?
The Witness: Yes sir.
Q. How high is the car?
A. About four or five feet.
Q. Show about on your body how high it is.
A. About there. (Indicating the waist line.)

Mr. Pickett: Turn around to the jury.

43 The witness turns to the jury and indicates his waist line.

The Court: How much longer will your examination be of this witness?
Mr. d'Autremont: As soon as I can find out how this happened. I haven't the slightest idea how it happened.
Judge Sutter: Do you expect to find out?
Mr. d'Autremont: I am going to try to.
44 The Court: Very well, we will take our usual afternoon recess at the present time. Gentlemen, we are about to take the usual recess, and the court instructs you not to discuss this case

among yourselves or with any other person, and you will not make up your mind in regard to the merits of the case until you have all the evidence and the instructions of the court before you. You will be excused until called.

At the hour of 3:00 o'clock P. M. the court took a short recess.

3:20 o'clock p. m.

The court reconvened at this time after the adjournment. The plaintiff present in person, and by Judge Sutter his counsel, and the defendant by Mr. d'Antremont, and Mr. Pickett as its counsel, and the jury in the jury box, and all parties announcing themselves ready to proceed, the hearing of the cause was resumed as follows:

The Court: Do the parties waive the roll call?
Mr. d'Antremont: Waive the roll call.
The Court: All right, let the record show. Proceed with your cross-examination.

FRANK TOMICH, Plaintiff, being called as a witness in his
45 own behalf, and having been duly sworn according to law, resumed his testimony through the interpreter, as follows:

Cross-examination continued.

By Mr. D'Antremont:

Q. Mr. Tomich, can you tell again just what you did just when your fingers were caught?
A. I pulled the car with my left hand, trying to loosen my right.
Q. What did you push against with your left hand?

Judge Sutter: Now, we object; he didn't say he pushed. He said he pulled.

Q. What did you brace yourself against to pull the car with your left hand?
A. With my left hand and my leg. I braced myself with my leg and pulled.
Q. What did you press your leg against?
A. The middle of the car.
Q. Then you pulled the car down?
A. Yes.
Q. Did it come back on to the truck?
A. Yes sir.
Q. How did you leave the car?
A. The car went to the chute, and I left *if* there.
Q. Was the car level or upended when you left it?
A. I don't know.
Q. About how long would you say you were held up there by your fingers being caught?

46 A. Around about twenty minutes.

Q. Then your fingers were caught between the protection bar and the end of the car for about twenty minutes?

A. Yes sir.

Q. You are sure of that, are you?

A. Yes sir.

—. Did you call out when your fingers were pinched ?

A. I did, but nobody heard me.

Q. Then what did you do after you released your fingers after you had been held there for twenty minutes?

A. I fell down and I stayed there for about nine or ten minutes.

Q. You are also sure of that fact, are you?

A. Yes sir.

Q. You are just as sure of that fact as you are that you can't work at this time?

A. Yes sir.

Q. Do you remember who it was that you first saw?

A. I saw a man, but I don't know who he was, and he went away.

Q. Did he leave you when your fingers were crushed without helping you?

A. He didn't help me; he went away.

Q. Do you remember who he was?

A. Yes sir.

Q. Who was he?

A. Mike Madee.

47 Q. Did you call out to him?

A. No sir.

Q. Didn't you tell him your fingers were hurt?

A. Yes, I told him. He looked at them and he went away.

Q. Who was the next man you saw?

A. The shift boss.

Q. Mr. Murphy?

A. Yes.

Q. Where did you see him?

A. On the switch.

Q. Right there at the chute practically?

A. In a drift.

Q. How far from the place where you were hurt did you first see Mr. Murphy?

A. Ten feet.

Q. You know a number of words in English, do you not?

A. A few.

Q. Did you walk—how far did you walk with Mr. Murphy?

A. As far as the station, and he tied my hand there, and sent me on top.

Q. But you didn't see Mike again from the time you first saw him and he went away?

A. He took my bucket; he took my bucket out.

Q. He took your bucket out?

A. This fellow Mike took my bucket out.

48 Q. Did he go along with you to the station?

A. He came after.

Q. Then Mike did not walk away from you after he saw your fingers were hurt, did he?

A. Yes sir.

Q. How long was it between the time that you were hurt and you saw Mr. Murphy?

A. About five minutes after I got hurt.

49 Q. Was it five minutes after the twenty minutes that you hung at the car?

A. He says after I took my fingers out, I was down on the ground for about ten minutes, and about five minutes after that the shifter came.

Q. So that it would be about thirty-five minutes, counting the twenty minutes that you hung by your fingers, and the ten minutes you stayed on the ground, and the five minutes before Mr. Murphy came?

A. Yes sir.

Q. That is right?

A. Yes sir.

Q. When did you go to work after the accident?

A. About twenty-four days.

Q. Did you see Mr. Roscoe before you went back to work?

Judge Sutter: Now we object to that as immaterial.

The Court: The objection will be sustained.

50 Q. Did you see Mr. Roscoe after you went back to work?

Judge Sutter: We object to that as immaterial, incompetent and irrelevant.

The Court: Objection sustained.

Q. When was the first time you did see Mr. Roscoe?

Judge Sutter: We object to that on the same ground.

The Court: The objection will be sustained unless the materiality should be shown. You didn't mention Mr. Roscoe's name in the direct, did you?

Judge Sutter: No.

Q. Who acted as interpreter between yourself and Mr. Sutter, Judge Sutter?

Judge Sutter: I object to that as immaterial.

The Court: Objection sustained.

Q. What have you been doing since the time you returned to work, Mr. Tomich?

A. Nothing.

Q. What do you do all day long?

A. I can't do nothing; my hand pains me.

Q. Do you help about the house any?

A. No sir, I can't.

Q. Do you help your wife at all?

A. No sir.
Q. Where do you get your money to live on?

Judge Sutter: We object to that as immaterial.
The Court: Objection overruled.

The Witness: Why, the grocers hold me up.
Q. Do you mean—what do — mean by the grocers holding you up?
51 A. I mean that the men that run the grocery stores is trusting me for the groceries.
Q. Has he ever sent you any bill?

Judge Sutter: We object to that as immaterial.
The Court: Objection sustained.

Q. Has the meat men trusted you since this accident?

Judge Sutter: We object to that as immaterial.
Mr. d'Autremont: I have the right to find that out.
The Court: The objection is sustained. It is legitimate to cross examine this man as to his occupation. but I think that is going further than the original examination.

Q. Does your wife do any work to support the family.
A. No sir.
Q. Where do you live?
A. Upper Lowell.
Q. Do you own the house?
A. It is my house, but I owe on it.
Q. Since the time of your accident, have you tried to work at all, except that one day when you went back to the Cole shaft.
A. No sir, only that one time.
Q. Have you ever tried to do any hard work since the date of your injury?
A. I could not do it.
Q. Have you tried to do any hard work since the date of your injury?
A. No sir.
Q. Do you know then that you could do any hard work if you did try?
52 A. No sir, I could not.
Q. Who chops wood at your house?

Judge Sutter: We object to that as immaterial.
The Court: Objection overruled.

Q. Who chops the wood at your house?

Judge Sutter: We object on the further ground that it does not show that they chop any wood at their house.

Q. Do you use gasoline at your house?

The Court: The question may be answered.

The Witness: I buy my wood already chopped.
Q. Since the time of your accident, have you tried to take hold of anything with your right hand?
A. I did, but I can't hold anything heavy.
Q. Did you ever try to hold anything light?
A. I did, but I could not hold it.
Q. Did you ever come back to the company and ask for a light job until your right hand got strong?

Judge Sutter: We object to that as immaterial. He is not compelled to ask for a light job.
The Court: Objection sustained.

Q. Did anybody ever tell you not to work until this trial was over?

Judge Sutter: I object to that as immaterial.
The Court: Objection overruled.

The Witness: No sir.
Q. How do you intend to pay your bills?

Judge Sutter: We object to that as immaterial.
The Court: Objection sustained.

Q. What do you intend to do the rest of your life?

Judge Sutter: We object to that as immaterial and irrelevant.
53 The Court: Objection sustained.

Q. Have you been unable to sleep lately?
A. Last night my hand pained me until I could not sleep.
Q. That is what caused you that pale complexion, is it?
A. That is my natural color.
Q. You haven't lost any good color from loss of sleep have you?
A. No sir.
Q. Have you been to the doctor since you were examined by Dr. Bledsoe, and the Queen doctor, and Dr. Patton?

Judge Sutter: We object on the ground that he has never been to a Queen doctor.
Mr. d'Autremont: He testified to that.
The Court: Objection overruled.
Judge Sutter: We withdraw the objection.

The Witness: Yes sir.
Q. Who?
A. Dr. Hawley.
Q. When was it that you saw Dr. Hawley?
A. The month of June.
Q. About what time?
A. 1915.
Q. Have you been to any doctor since you saw Dr. Hawley?
A. Yes, I was to see some Queen doctor.
Q. When was that?

A. I don't know; I forget.
Q. What Queen doctor, do you know his name?
A. No sir.
Q. Where did you see this Queen doctor?
54 A. In their dispensary.
Q. Double up your right hand?

(The witness doubles his right hand as requested.)

55 Q. Now you say, Mr. Tomich, in pushing your car, that you threw the lever about seven feet from the chute?
A. Yes.
Q. Do you know if the bumping board on the ground was broken by that car hitting it at the time of this accident?
A. I don't know.
Q. Did you ever, when you dumped your car reach down and dump it from underneath?
A. No sir.
Q. What does the word "Top" mean?
A. Means on top.
Q. It means the reverse from "bottom"?
A. No.
Q. Do you know what the word "catch" means?
A. No sir.

Mr. d'Antremont: Have you any objections?
Judge Sutter: I don't know.

(Mr. d'Antremont hands Judge Sutter a card.)

56 Q. I ask you, Mr. Tomich *is* that is your writing?
A. No sir.
Q. I will ask you, Mr. Tomich, if that is your signature?
A. No sir.
Q. What is the name of your wife, Mr. Tomich?
A. Katie Tomich.
Q. Is the name of your daughter Marie?
A. Marie.
Q. Is the name of one of your sons Lee?
A. Yes sir.
Q. What is the name of that child? (Indicating child present in the court room.)
A. His name is Joe.
Q. You knew which one I was pointing to when I was pointing to Joe?
A. No sir.
Q. You are positive that is not your handwriting? (Indicating writing on a card.)
A. Yes sir.
Q. Do you know whose handwriting that is?
A. No sir.
Q. Never saw that card before?

Judge Sutter: For this case, he can ask him one question and find out all about it. He can't either read or write.

Q. Have you seen Mr. McDonald since the time of this accident.

57 A. I have seen him, but I never spoke to him.

Q. Did you see him in Bisbee?

A. No, I saw him in Lowell.

Q. Who was with you when you saw Mr. McDonald?

A. I was alone.

Q. Who is Mr. McDonald?

A. He is a Texan.

Q. Where did you know Mr. McDonald?

A. I got acquainted with him in the mine.

Q. Did he work on the same level with you?

A. Yes sir.

Q. Was he the man awhile ago you called Mike?

A. Yes sir.

Q. He was the man you saw in the drift at the time you were hurt, was he not?

A. Yes sir.

Mr. d'Antremont: I think that is all.

Mr. Pickett: Yes, I think that is all.

58 Redirect examination.

By Judge Sutter:

Q. What kind of a car was it that you were running at the time of this accident?

A. Why, it was an ordinary ore car.

Q. Describe it, as to whether it had handles on both sides or not?

A. The car had one handle.

Q. Where was that handle located? On which side of the car?

A. It was on the left side of the car.

Q. Left side of the car, in front or behind?

A. Behind.

Q. At the time your fingers were caught between the car and the plank, what injury was done the first three fingers of your right hand? Just describe the injury?

A. The car cut my three fore fingers; the tips off the fingers.

Q. How much of the tips?

A. The tips off the fingers, that is all.

Q. When dumping a car in the ordinary course of your work, describe the position of the hind wheels of the car when the body of the car is dumped?

A. The hind wheels are on the ground.

Q. By "on the ground," do you mean on the track?

A. Yes sir, on the track.

Q. That is when you are dumping cars ordinarily, the hind wheels remain on the track?

59 A. Yes sir.

Q. Now, when this car dumped that caused this injury, where were the hind wheels?

A. Up in the air.

Judge Sutter: That is all.

Recross-examination.

By Mr. D'Antremont:

Q. How long did the hind wheels stay in the air?

A. About twenty minutes.

Q. How were the hind wheels when you left the car?

A. I don't know.

Q. Did you look at them at the end of this twenty minutes to see whether they were still in the air?

A. No sir.

Q. What makes you think they were still in the air then at the end of twenty minutes?

A. They were up in the air until I got my hand out.

Q. Then what became of them?

A. I don't know.

Q. Did this car dump up easy or hard?

A. I don't know.

Q. How many times did you have to dump it to find out whether it dumped easy or hard?

A. It dumps pretty fast.

Q. Does the lever go over—did the lever go over pretty easily?

A. Not very easy.

Q. How do you happen to remember that there was but one handle on that car?

60 A. I didn't see but one. If there was any more, I never saw it.

Q. You are positive there was but one handle on that car?

A. Yes.

Q. Did you ever switch that car?

A. No sir.

Q. You only shoved it up and down straight, the drift straight?

A. Yes sir.

Q. How did you ever happen to have occasion—strike that out. Did you ever have occasion to use the handle of the car?

A. I used the handle when I was pushing the car.

Q. Do you use those handles on the side when you push the car?

A. I only use the handles when the car is going at a fast gait before I dumped it.

Q. Then, how did you use the handles?

A. Some kind of a hook on the car you have to unhook.

Q. Did you ever look to see if there was a handle on the left side?

Mr. Kingsburg: He stated there was on the left side.

Q. Was there a handle on the right hand side?

A. On the left.

Q. What held the rings that go over the lever if there was no handle on the right hand side?

A. On that car, the lever was on the left hand side.

61 Q. Oh, the lever flew from the right hand side over to the left hand, is that the way it was?

A. Yes sir.

Q. You are sure of that, are you?

A. Yes sir.

Q. You used that car enough to remember it, that you always threw that lever to your left hand?

A. I used it just that one shift.

Q. Have you talked to your attorneys about that car?

A. No sir.

Q. You are as positive that that lever worked from left to right as you are anything that you have testified to about this accident, are you?

A. Yes sir.

Q. Was there a ring on the left handle of that car that held the lever?

A. Yes sir, there was.

Q. Did you have any difficulty in dumping that car?

A. The last car? Do you mean the last car?

Q. That car; I mean that car?

A. That car, at the time of the accident?

Q. No, at any time; dumping that car?

A. No sir.

Q. Then you dump just as well with your left hand as you do with your right?

A. No, I can't, but that car was made that way, and I had

62 to.

Q. It worked all right, though, at that time, did it?

A. Yes sir.

Mr. d'Antremont: That is all.

Judge Sutter: That is all.

The Court: That is all.

Witness excused.

63 KATIE TOMICH, being called as a witness on behalf of the Plaintiff, and having been duly sworn according to law, through the Interpreter, testified as follows:

Direct examination.

By Judge Sutter:

Q. State your name to the jury.

A. Mrs. Tomich.

Q. Are you the wife of Frank Tomich?

A. Yes.

Q. Do you remember on the—do you remember on the 9th day of November, 1914?
A. Yes sir.
Q. When your husband was injured?
A. Yes sir.
64 Q. Since that time has your husband performed any work of any kind, Mrs. Tomich? Has he worked for any company since that?

Mr. Pickett: Now, let me object to that, Your Honor, the form of that question, before it is answered. It strikes me that it would be proper to have the witness state whether she knows whether
65 or not the plaintiff has worked at any place.
Mr. Kingsbury: All right.
The Court: You had better reframe your question.

Q. Do you know, Mrs. Tomich, since the 9th of November, 1914, whether your husband has had employment in any of the mines in Bisbee?
A. No sir.
Q. He has not?
A. He has not.
Q. Do you know what has been the effect upon Mr. Tomich of the loss of the hand, of the three fingers of his right hand?

Mr. d'Autremont: We object to that, Your Honor, if she is going to state anything that he said to her.
Mr. Kingsbury: We do not want her to say what he said.
The Court: The question is whether she knows. If she knows she can answer the question.
Mr. Kingsbury: Yes, ask her the question.

The Witness: Yes.
Q. What does she say?
A. He was very bad.
Q. State what effect, if any, it had upon his sleep at night?
A. He could not sleep most of the time; he would be up there day time and nights.
Q. State whether or not at times he has made any exclamation of pain when his fingers would touch anything?
A. Yes, a good many times.

66 Judge Sutter: That is all.
The Court: Cross Examine.

Cross-examination.

By Mr. D'Antremont:

Q. You and your husband speak about equally good English?
A. My husband can't speak at all.
Q. How old is the baby, Mrs. Tomich?
A. Three months.
Mr. d'Antremont: That is all.

Witness excused.

67 ED MASSEY, being called as a witness on behalf of the Plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination.

By Judge Sutter:

Q. You may state your name.
A. Ed Massey.
Q. What is your occupation, Mr. Massey?
A. Deputy State Mine Insepector.
Q. Where do you reside?
A. Bisbee.
Q. How long have you been Deputy State Mine Inspector?
A. One year.
Q. What was your occupation prior to your becoming State Mine Inspector?
A. Miner.
Q. How long have you been a miner?
A. Oh, about twelve or fifteen years.
Q. What mines have you worked in?
A. Well, I worked all over Colorado, part of Idaho, California, Arizona and New Mexico.
Q. Did you work in the mines in the Warren District?
A. Yes sir.
Q. What mines did you work in there?
A. Holbrook, Oliver, C. & A., Junction. Nearly all of them.
Q. Now, in the course of your work as a miner, did you ever have occasion to load, run and push cars?

68 A. Yes.
Q. You have observed how that work was done by others, have you?
A. Yes sir.
Q. You fairly understand how cars are loaded, run and pushed?
A. Yes sir.
Q. Just describe to the jury, the manner and usual method of pushing the usual car on the ordinary track?
A. Well, the condition of the track would have a great deal to do with that.
Q. Describe to them about the different conditions of track, and the ordinary method?
A. If the track was clean, a man would not—he would not have to put as much force up against it as he would if the track were dirty. That is, loose rock over the track.
Q. Now, a track that is slightly down grade with a loaded car, describe the position that a man's hand should be in in controlling and handling that car?
A. Well, he would take hold of the top of the car, and just push it along.
Q. If it were down grade, would it be necessary for you to push it?
A. No, you should always keep your hands on the car.

Q. You keep your hands on the top of it, as you say?
A. Yes sir.
Q. Illustrate with that chair, if you can, by getting up and going behind it. Counting that (Indicating) as the rear end of the car.
A. About like that. (The witness takes a chair and
69 demonstrates.)
Q. That would be your position?
A. Yes sir.
Q. Suppose the car had handles on it, in pushing the car would you use those handles?
A. No.
Q. Why not?
A. Well, because—several reasons.
Q. Tell the jury what those reasons are?
A. If you took hold of the handles of the car, if there is timbers or anything that is close, they will pull your fingers off. You take hold of that lever where the lever is connected with the handle. When the cars get old, there is motion in this lever and will pinch your fingers between the handle and the lever. Of course, on a new car, it won't do that, but after they get worn, it will.
Q. Then, in a drift, are the timbers the same distance from the track or not?
A. No.
Q. Doesn't it frequently occur that timbers press in towards the track, and if you had your hand on the handle of the car, your fingers would be torn off?
A. Yes sir.
Q. Then, as an ordinary matter of safety, the proper place to keep your hands is the back of the car?
A. Yes, sure.
Q. Usually, in dumping the car, what is the ordinary method?
A. A track going down hill, if it is not too much hill, you
70 unlock your car and let it dump itself, but where you have to push it up to the dumping block, you have to throw the lever and then you have to lift your car.
Q. Isn't it a fact on the ordinary car the front end extends further over?

Mr. d'Antremont: We object to that.

Q. Describe how the body of the car is fixed on the trucks?
A. Well, the car is evenly balanced, or most of the cars are evenly balanced. Sometimes you get hold of a few cars that are not. It is according to a man's judgment what kind of a car he wants to put in the mine, but a car should be. A car evenly balanced—that is, the swivel in the center of the car.
Q. Now, in running up to a chute, with the surface of it, or the top of the chute is even or practically even with the track, how would you dump a car ordinarily, or how would you in handling your car?
A. I don't understand your question.
Q. You know how the chutes are in the mine?
A. Yes sir.

Q. You are running a car on the ordinary car track up to your chute, how would you dump it?

A. I would try to keep my hands off from under the chute.

Q. You would try to keep your hands off from under the chute?

A. Yes sir.

Q. Certainly, but how would you dump the car?

A. Just as I say, in the ordinary track, do you mean?

71 Q. Yes?

A. I would unlock it and lift it over. I would not try to throw it over.

Q. Would you have your hand on the back or the top of the car?

A. There is no chute there. I would not have it under the chute.

Q. There is no chute there?

A. You mean dumping into a raise?

Q. Yes?

A. To make my work easy, I would unlock and hit the bumping block, and let the weight of the car throw it over.

Q. Where would your hands be?

A. I would have my hands on the top of the car unlocking it. The chances are, I would have one on the end.

A. One on top of the car, and one to unlock it?

A. Unlock it, yes sir.

Q. Now, with the track slightly down grade, you are an expert miner and understand all of those things, a man pushing a car on a track that is slightly down grade, a loaded car, at the ordinary rate of speed, and he slips on the rail of the car, what would be his position if he would slip? Would his hands still remain on the car, or not?

Mr. d'Antremont: I object to that as not being an expert question, a question to an expert.

The Court: Objection sustained.

Q. What are the handles put on cars for, Mr. Massey, ore cars?

72 A. To generally, turn the cars.

Q. Explain—get up and explain to the jury, using the back of the chair as an illustration.

A. Well, if you are coming to a turn sheet, if it is not too hard to turn it, going too fast, you catch the handles, one handle and swing it, or if you are going to make a turn, a hard turn, you take hold of the car, with your shoulder up against the car, and swing it like that (Indicating), but if it is an easy turn, you swing it with your handle. If you want to hold the car back, you make it grab or release. You take the car like that (Indicating) and make the wheels cramp on the track.

Q. Ordinarily, in pushing a car, you don't have hold of the handles?

A. No.

Q. You have your hands on the back of the car?

A. On top of the car.

Judge Sutter: That is all.

Cross-examination.

By Mr. D'Antremont.

Q. Mr. Massey, you say in pushing a car on the track, it would depend on the car and the condition of the track?

A. Yes.

Q. It would also depend on how well the wheels are greased?

A. Sure.

Q. It would not depend on any particular condition?

A. No sir.

73 Q. It would depend upon all the combined circumstances?

A. According to how heavy the car is loaded.

Q. Now, in a straight chute, as you say, you never have any need of using the handles of the car?

A. No sir.

Q. Did you ever, in all your experience in mining in New Mexico, Colorado or Arizona, ever see a mining car which dumped from left to right?

A. What is the question?

Q. In all your experience in Colorado, New Mexico, and Arizona did you ever see a mining car which the lever threw from the left side to the right?

A. Not as I remember. I have seen several different kinds of car.

Q. You never seen that particular type?

A. It is a right handed car.

Q. You never saw a left handed car, did you?

A. Not as I remember.

Q. Now, in dumping the car—strike that out. In pushing the car in the ordinary course of mining, where your hands, as you said, are this way (Indicating) or is it a safer way to put your hands on the back of the car this way (Indicating) and pull it straight up? (The attorney now demonstrates on a mining car that has heretofore been brought into the court room.)

A. You can't push a car like that.

Q. You can't?

A. No sir, holding your hands out like that. All the

74 weight is against your wrist. Then you can't hold your hands down on the car.

Q. All men don't work alike?

A. Isn't your hands up over the top of the car.

Q. That way? (Indicating.)

A. That is about four inches wide, and the car is about an inch and a half wide on top.

Q. Suppose the ore is loaded up on top of the car, would that be a proper position for your hands?

A. Yes, you would have the palm of your hand against the back of the car.

Q. It is the way a man happens to take hold of a car; it is according to whether the car is level full?

A. Oh, if the car were loaded up even with the top, you would not get your fingers down over the edge of it.

Q. You would not?

A. No, I don't think I would run my hand down in muck to get hold of it.

Q. You—do you consider it the best practice to throw your lever six or seven feet before you get to the chute?

A. Well, the condition of the track has a great deal to do with that.

Q. Assuming that the track was in good condition, and all things being equal, would you throw your lever before your car came to a stop?

A. I would.

75 Q. That would necessitate your reaching down?

A. Yes sir.

Q. Would you consider that a safer way?

A. No, I would not see any difference in it.

Q. Did you ever hear of a man catching his fingers between the back of the car and the chute bar, protection bar across the top, causing the car to be up-ended quick when it hit the bumping board at the bottom?

A. I never heard of a man's catching his fingers.

Q. You never?

A. No, I did not.

Q. You never heard?

A. You mean the guard rail?

Q. Guard rail?

A. No, this guard rail, according to law, should be under four feet.

Q. In height?

A. In height, and when the car upended his fingers would be above the end.

The Court: You mean the guard bar would be more to the side of the car?

The Witness: No. You take a car that high (indicating), the guard rail, put it four feet, and when the car comes up, your hands would be above the guard rail.

The Court: The part that you clutched with your hands, would not hit the guard rail?

The Witness: No sir, if it is put in according to law.

76 Q. If the car upended, and went over that way (indicating) it could not possibly hit any guard rail?

A. Probably throw over in there.

Q. It could not go past it?

A. No, I don't think you can.

Q. Most cars, you say, are evenly balanced?

A. I mean the make of the cars are supposed to be evenly balanced. A car on the ordinary track, going along, you can unlock your lever and it won't tip over. The weight, you hold with your hands, going along on a level track.

Q. Would you consider it at all necessary for a man, in dumping his car, to go up against the chute?

A. It would depend on how high the chute board is.

Q. No matter. Do you ever consider it necessary for a man to catch it?
A. No sir.
Q. You never saw a man catch his fingers in there?
A. No sir.
Q. It would not be regular for a man to catch his fingers there?
A. No.
Q. As an expert miner, do you see any necessity for a man, pushing his car, in the ordinary course of business, to slip upon the rail?
A. That is according to the condition of the drift where he is working.
Q. Provided it is not wet. Dry runway, the dirt even with
77 the ties, is there any necessity for a man to slip?
A. You can't tell; he is liable to trip.
Q. Is it not owing to the condition or conditions of the mines?
A. Lots of mines the- are not hard.
Q. A dry drift, and level track, timbered, and ties even with the dirt, is there anything in that situation to require a man to slip upon the rail?
A. Not necessarily, but he is liable to slip on the rail.
Q. If he does slip, is it due to any condition of the track or ties?
A. If it is perfectly smooth, I would not see any.
Q. It would be due to the unfortunate condition of the man rather than the condition or conditions of the mine?
A. Yes sir.

Redirect examination.

By Judge Sutter:

Q. Isn't it due to the condition of the employment that he is employed in at the time he slips?

Mr. d'Antremont: That is a conclusion, Your Honor.
Judge Sutter: This man is an expert.
The Court: Go ahead.

The Witness: As I say, he is liable to slip on the rail. The
78 rail is perfectly smooth, and if a man steps on the rail, his foot is liable to slip.
Q. Now, it is necessary, in the first place in pushing a car, to have a car?
A. Yes sir.
Q. Necessary, in the second place, in order to push that car in the mine, to have a rail?
A. Yes sir.
Q. And then necessary to be behind that car to push it with force?
A. Yes sir.
Q. And doing so you necessarily stretched out pushing it?
A. Yes sir.

Q. And your feet, you can't watch and see where they are going?
A. No, not all the time.
Q. Therefore, you can put your foot on the rail and slip, can't you?
A. Yes sir.
Q. And that would be due to the condition of the employment, wouldn't it?
A. Yes sir.
Q. Now, Mr. Massey, Mr. d'Antremont has asked you to describe about dumping a car where you voluntarily dump the car in the chute, but suppose a car moving along at the average rate of speed that ore cars are run, without releasing the lever runs up there and hits the dumping board or rail at the bottom, and the car dumps itself without the lever being released, and a man
79 tries to hold it, and holds his hands on the top of the car, and the guard rail is five feet high, what would be apt to be the result?
A. Well, the back end of the car would raise, and he could not hardly turn loose from the car, because it is kinda second nature to try to hold your car down, and keep it from dumping.
Q. And his hands would be on the back of the car naturally?
A. If he was pushing it by holding to the top.
Q. And where would the hind wheels be? Would they remain on the track, if the lever was not released?
A. When the front wheels hit this dumping block, the back wheels, if the car is not locked—if the car is not unlocked, the wheels and the bed and all will raise up off the track a little bit, according to how high it raises, according to how fast it is going.
Q. And a man hanging on to the car would go up with it?
A. His hands would go up, and if it goes up far enough, he will go clear up.
Q. And if the guard rail is high enough, his hands are apt to be caught between the car and the guard rail?
A. It is according to where the guard rail is. It is liable to catch his head, if it goes over far enough.
Q. What is the weight of those ordinary cars empty?
A. Anyways from two thousand to twenty-five hundred pounds, I should judge. I mean the C. & A. Company's cars. The Copper Queen Company's cars in Bisbee, they are lighter; they are smaller.

Judge Sutter: That is all.

80 Recross-examination.

By Mr. d'Antremont:

Q. You can't watch your feet, but you can pretty well tell where they are going?
A. I don't know.
Q. You don't have to look at your feet?
A. You suppose the track is in good condition.

Q. I am not talking about the track. In ordinary walking, you don't know where your feet are?

A. No.

Q. In walking down the track, you would know where your feet were without watching them?

A. I don't know that. I would know where they are at.

Q. Is it a necessary condition every time a man steps over a track to slip on it?

A. No, not every time.

Q. It does not necessarily follow that the track, because he walks on it he will fall?

A. If the track was wet.

Q. A dry track?

A. A dry track, no, it is not necessary to slip on it.

Q. The weight of your car would depend on the kind of cars?

A. Yes sir.

Q. There is no general rule?

A. There is no general rule of the capacity of the cars.

Q. If a man fell ten feet away from the chute, would you say, in the ordinary course of events, he would be dragged by one hand and be yanked up in the air?

81 A. No, I don't say that.

Q. In the due course of mining, would that be considered usual?

A. If your car is going along slow and you trip, you will naturally hold on to this car, and it will pull you down in the center, and you can pick yourself up while holding on to the car, and the car does not get away from you.

Q. It would all depend where the man catches his fingers and where the bar is. There is no general rule?

A. No, every accident happens different.

Mr. d'Antremont: I guess that is all.

Examination by the Court:

Q. If I understand you correctly, where these cars are dumped is a guard rail or a bar put across somewhat in this position?

A. Yes sir.

Q. And in dumping this at the chute, it comes along and strikes the bumping board at the bottom, and the dumping board flies up in this manner, and dumps the car?

A. Yes, sir.

Q. Is it the purpose of this to keep the car from going on over?

A. It has two purposes. A guard rail to keep the men from walking into the chute, and keeping the car from dumping over.

Q. You said something about the height to erect the rail?

82 A. Yes sir, under the mining code, it is three and a half to four feet.

Q. If that guard bar has the height specified by law, and one of the ordinary mining cars dumps, either by the lever being thrown,

or by dumping or throwing the whole car over, suppose the lever is not thrown, is it possible for a man to have his hands on the back of his car and still strike that, or will it be impossible?

A. Well, it would depend on the condition of that guard rail, whether it was higher than the legal height.

Q. I am assuming that the height is regular as provided by the mining rules?

A. No, I don't think it will, Judge.

Q. The guard rail will strike further down on the body of the car?

A. Yes sir.

Q. Is that the idea?

A. Yes sir.

Q. So that if his hands should strike the rail, the rail would not be the height regulated by law, is that the idea?

A. Yes, sir, that is the idea.

The Court: I understand exactly the condition in the mine, but some of the jurors are not miners.

Mr. d'Antremont: If the jurors desire to ask any questions, they may do so.

A Juror: Are you employed by the State of Arizona?

The Witness: State of Arizona.

Examination.

By Mr. d'Antremont resumed:

Q. Mr. Massey, is the height of that guard rail regulated by the Code?

83 A. Yes sir.

Q. The statute I have in my hand?

A. I never looked at it in there. I have a little pamphlet called the Mining Code.

Q. Are you sure that that cross bar refers to a chute, or might it refer to a shaft?

A. It refers to any opening.

Q. Any opening?

A. An opening in the stope that a man is liable to fall into or walk into.

The Court: I think Mr. Massey refers to Paragraph 4075?

Q. Mr. Massey, what is a winze?

A. A winze, why it is any place under ground which would be a shaft on the surface, but they call it a winze when it is under ground, sunk under ground.

Q. A winze, then, is a hole?

A. Yes, it is a hole going down under ground. You would not call it a winze if it starts from the surface?

Q. A chute would be a winze?

A. No, a chute would not be a winze.

Q. What is a chute?

A. A chute is where the ore goes into, or waste or whatever it is. It is an opening that you load your car from.

Q. Are you familiar with the mining cars in the C. & A. mine?

A. Yes sir.

84 Mr. d'Antremont: I will ask to bring in the mining car, and have it identified.

Q. Are you familiar with the mining cars used in the Cole shaft?

A. Yes sir.

The Court: Are you familiar with the cars in the Cole shaft?

The Witness: I was not in the Cole shaft, but I have been in and around the C. & A. mine for years.

Q. They are about the same cars?

A. Yes sir, about the same cars.

The Court: They are all about the same kind of car?

Judge Sutter: I will state right now that I don't object to bringing that car in here for this witness to demonstrate it. Of course, I would object to having the plaintiff being bound by it without its being the same, but I don't object to Mr. Massey demonstrating or illustrating his testimony by using it.

The Court: All right.

(The mining car is again brought into the court room, and the witness uses it for the purpose of illustrating his testimony.)

The Court: Would that along there (Indicating a railing in the court room) substantially represent the dump board?

The Witness: It is a little too high.

The Court: This is the relative idea of a dumping board?

The Witness: Yes sir.

85 Q. The dump board might be made of different size timber?

A. Yes sir, but they generally use ties.

Q. You say you could not push your car with your hands in that position? (Indicating.)

A. Oh yes, you could.

The Court: Show the jury the ordinary position of a man pushing a car on a track that is slightly down hill.

(The witness indicates as requested.)

Q. And the car empty? The car loaded?

A. I would put my hands on the car—the ore is up level, which is seldom——

Q. Very seldom?

A. It is very near full up to the top. When you are walking along fast standing, you generally get stretched out like that. (Indicating.) If you are walking along fast, you are standing up like this (Indicating) and then you hold your hands up.

The Court: The natural position which a man takes?

A. Yes sir.

Q. Now, you show how you would throw your lever as you approach the dump?

A. With some of the old cars, you throw it that way. (Indicating.)

Q. You would throw that lever with your right hand, would you?

A. Sure.

Q. So that if you never saw a car that threw from left to right, a man approaching a chute would use his right hand under all conditions?

A. I don't see how he could reach over this way. (In-
86 dicating.)

Q. In case he threw the lever with his right hand, which hand would naturally be on top of the car?

A. Left.

Q. Would you show how the car would be when it is dumped?

A. How the car would be when it is dumped?

Q. How you would dump a car.

A. Well, if I had it up to the dumping block, I would place this leg up against the back of the car about that way. (Indicating.) That keeps the car from running back.

Q. Show how it is.

A. That was—that leg keeps the car from coming back, and also from raising up.

Q. Now, this chute bar, which you say the law requires to be not more than four feet in height up to the level of the drift, where would that hit the car?

A. It ought to strike the car along about here. (Indicating.)

Q. If the back wheels are upended, would it not be apt to hit the car further back?

A. To keep your car on the track, your bar ought to strike it in here. (Indicating.)

Q. But if the back truck goes off the track, would that not throw this other down?

A. Sure; it is according to how fast you are going the further up this goes, until you get to a certain angle.

Q. It does not follow that the chute bar is illegal as to height because your fingers, on a car of this type, would hit the chute bar?

87 A. No, the chute bar would come about to its ordinary height here. (Indicating.)

Q. Where would the chute bar be?

A. About here. (Indicating.)

Q. Now, if this car had hit the bumping board, about where would the chute bar be?

The Court: Wait until I get the measurements, and then Mr. Massey can illustrate.

Mr. d'Antremont: I don't need the measurements.

The Witness: It is according to where that chute bar is placed. If it is placed square over your bumping board—if this chute block or dump block was directly under the chute guard, or the guard rail, it would strike the guard about here (Indicating) up to along about here. (Indicating.) It is when it is dumped clear over.

The Court: What would be the effect, Mr. Massey, supposing the car did not dump as you have indicated there, but the hind wheels and truck went up with the car, would the chute board or bar strike further back on the car or further forward?

The Witness: Further back that way. (Indicating.) Sometimes those cars don't unlock.

The Court: I am supposing that it struck the dumping board.

The Witness: The whole truck would strike.

The Court: Then the guard bar would strike further back on the car?

The Witness: Yes sir.

Q. So if the back truck upended far enough, he might readily catch—he might readily hit the back end of the car with the chute board?

88 A. When the car——

Q. Answer "yes" or "no."

A. It might readily hit the back edge of the car.

Q. It might?

A. Yes sir.

Q. And still be at its proper and legal height?

A. Well, it would be owing to the condition of the bumping block, where that guard was placed. If it was placed directly over this bumping block, then after the car gets so high it starts to go down again.

Q. Now, will you trip the car, please.

(Witness does as requested, by tipping the body of the car over.)

Q. Now, will you show the relative position, supposing the wheels were up against the bumping board where the chute bar would be?

A. The chute bar should be right about here (Indicating) That should be over.

Q. Does the law require the chute bar to be of any particular material?

A. No sir.

Q. Must the top or bottom of it be four feet?

A. The bottom of it.

Q. The purpose of it is, when they say the maximum height of the bottom if it shall not be more than four feet is to keep the car from going over too far?

A. That is the way I understand.

Q. So, if a timber two by six, four feet high plank be nailed across the chute, that would be just as good as a chute bar,

89 provided the lower part would not be more than four feet high?

A. Yes sir.

Q. Therefore, if a plank, say two by six or two by twelve were nailed across the chute of the height and type of that chute bar, of the height that is further up?

A. Yes, sure.

Q. So the chute bar would still be in compliance with the law and still might be able to hit further up?

A. Everything depends on the way the car is dumped.
Q. But the chute bar would be nailed of the same timber?
A. Yes sir, but this car, if it was locked and then goes over, this end will strike that square, about.

Examination.

By the Court:

Q. Mr. Massey, if the car strikes the chute bar when the chute bar is two by six or two by twelve or two by sixteen, doesn't it strike the bottom of the bar?
A. I would not say it would always strike the bar. If, when you come out with the car, and it tips over with you, this is liable to hit right square up.
Q. You mean the other end will stand vertically?
A. Vertical. It would hit this side the same as the bottom.
Q. A car in dumping does not always stop at an angle? Sometimes goes straight up in the air?

90 Judge Sutter: The car will stop at this angle. (Indicating.)

Examination.

By Mr. d'Antremont, continued:

Q. Let Mr. Massey tell. Now, take a car when it is stopped, some of these levers are loose, and you throw it over there (Indicating), and it does not unfasten the catch in front?
A. Yes. The whole thing will dump if you are going fast.
Q. If you are going at any rate of speed the whole thing will go over with you?
A. Yes.
Q. What angle does it go?
A. Sometimes goes straight up.
Q. Or stop at an angle of forty-five degrees as you have indicated?
A. It will stand on this end of the car.
Q. That is what I mean?
A. It will stand vertical.
Q. The car sometimes dumps so that it will stand practically vertically?
A. Yes sir.
Q. So I ask you again, it is possible for the chute bar to be at its legal and proper height——
A. Yes sir.
Q. —and for a man at the back of the car——
A. Yes sir.
Q. —if the door did not unlock, if the truck upends—Strike that out.

91 Examination.

By Members of the Jury:

Q. I would like to know, if your foot would slip, what position would your body remain in?

A. Well, that is according to whether you held on to the car, or whether it pulled you loose from the car, if it slipped a little bit.

Q. Your feet would remain on the ground, would it not?

A. Yes sir, you might catch yourself by holding on to the car. A man does not want to let his car get away from him, especially going down hill.

Q. If a man turns over that way, it would throw a man clear over the car?

A. Yes sir.

The Court: As I understand, Mr. Massey, with a loaded car, there is a weight from two thousand to twenty-five hundred pounds pulling on the man?

The Witness: Yes sir. It is natural for a man, I don't know why he does it, he will hold on to his car invariably. He won't turn loose from it.

Examination continued.

By Mr. d'Antremont:

Q. Do you think it is proper for a man to let his car get to going so fast that he can't control the speed when he is going to the chute?

A. Well, that is owing to the condition of the track.

Q. When the track is in a proper condition?

A. No, it is not.

Q. He should always have the car under control?

92 A. Yes sir.

Q. That is what he is there for?

A. Yes sir.

Q. Is it not true, in the usual condition of things, the track being proper, the car being proper, the runway being proper——

A. Yes sir.

Q. —it would be a man's own fault, letting the car get away?

A. Yes.

Q. Now, we will upend this car.

A. I don't know whether I can or not.

Q. The bumping board hits what part of the car?

A. The wheel. You want the bumping board so that it will catch the wheel there on the flange.

Q. Now, if the car is not froze——

Mr. Sutter: Unlocked.

Q. Unlocked. If the car is not unlocked and hits the protection bar and upends, then the back of the car can't hit the chute bar at the proper height?

A. Yes sir.

Mr. d'Antremont: Do the jurors wish to ask any questions?

Examination.

By Members of the Jury:

Q. Would it depend upon the per centage of grade.
A. The conditions of the track, and the conditions surrounding it.
Q. In order to control the car, you would have to have your hands on the inside in order to hold it back. You could not hold it back if you were up against the car?
93 A. Yes sir.
Q. If a man leaves go of this car and he has an accident and loses the car or lets it get away from him, he does not hold his job any more?
A. Well, that depends on the bosses. The average bosses——
Q. What would be your idea?

Mr. d'Antremont: We do not object to these questions.

Q. I don't think it would have any bearing on the bosses. What we want, if this man has that accident, would it have any effect on his losing his position?

The Court: You want to know the ordinary custom of miners?
94 The Juror: Yes.
The Court: You can ask if there is an ordinary custom in that particular.

The Witness: If this man should let this go and go to that guard rail, the chances are he would be fired.

Q. You mean that is the ordinary custom?
A. The ordinary rule.
Q. It would be to his interest to gain control of his car, and to see that it did not get away from him?
A. Yes sir, and also to his job and also to make a showing.

95 Examination.

By Mr. d'Antremont, continued:

Q. How fast would a car have to go to go through the protection board and bumping board?
A. It is acocrding to what kind of a guard rail is there, and protection bar.
Q. Providing the guard rail and protection bar are in good shape? How fast would a car like this have to be going?
A. According to the w-ight of the car; according to what it is loaded with.
The Court: It would be a question of the momentum of the car?
The Witness: Momentum of the car.
The Court: And the weight?
The Witness: Weight.

The Court: And the strength of the guard rail all taken together?
The Witness: Yes sir.
Q. And the momentum given by the man pushing?
A. Yes sir.
Q. Now, if a car is going along an ordinary track ordinary and natural on a slight grade, would it be apt to go through the dumping board or guard rail?
A. No.
Q. The guard rail made two by fourteen inches?
A. No.

Mr. d'Antremont: I think that is all.

96 Redirect examination.

By Judge Sutter:

Q. Mr. Massey, can you upend that car without unlocking it?
A. Possibly, yes sir. (Witness upends car.)
Q. Now, show the jury what position—I withdraw the question. Can you illustrate to the jury what position a man's body is in with the car upended to that position, and he holds on to it with his hands?

The Court: Some of the jurors have asked that a four foot measurement be placed on that.
Mr. d'Antremont: All right.

(Four feet in height is measured off.)

Examination.

By the Court:

Q. If you will hold that in the position that the guard rail will naturally occupy with reference to the dumping bar, the dumping bar, as I understand, would strike the car about here. (Indicating.)
A. The dumping block.
Q. The bottom of the guard rail. Suppose the car is upended, if it were four feet high, the car could not go that far?
A. It would kick it back.
Q. It would kick the wheels back?
A. Yes sir.
Q. The edge here, supposing it would be a good size guard rail?
A. I may add this. The guard rail, maybe the guard rail is high enough to let the car go in under. A car does not bump against the guard rail. It goes in under the guard rail.
97 Q. The top of the car?
A. The top of the car.
Q. Is this part (indicating) suppose- to go under the guard rail?
A. No sir.
Q. The front end goes under?
A. Yes sir.

Q. The purpose of the guard rail is to catch the car somewhere along there (indicating) and keep it from going on through?
A. Yes sir, and also to upend it.
Q. And if the car dumps, with the hind wheels of the truck leaving the track, the guard rail would ordinarily strike further back towards the back end of this car?
A. Yes sir.

Examination.

By Members of the Jury:

Q. Mr. Massey, what position would that car naturally get in to lift a man off the ground. How, if this is its position, how would it get a man to hold him off the ground?
A. Well, it would depend on the height of the man. It would not pull him off the ground. It is owing to how fast the momentum of the car would pull him. A man my height, it would naturally pull him up with the car, up in the air. It would pull him up off the ground.
Q. If that car was going fast, Mr. Massey, and you were hanging on to it, and it would hit that dumping board and turn over, it would naturally take you up in the air?
A. Yes sir, if I held on to it.
Q. The carman always hangs on to the top of the car?
98 A. Yes sir.

The Court: One of the jurors asked me if there was any evidence as to the condition of this guard rail, and I stated there was no evidence before the jury in regard to the rail.
Judge Sutter: As I recall it, it was about five feet from the ground.
Mr. d'Antremont: Who said that?
Judge Sutter: He may have told me that outside of the courtroom.
A Juror: He said four or five feet.

Examination.

By Mr. D'Antremont:

Q. Mr. Massey, if the guard rail were five feet, would it hit that car at all. Would it have been possible for him to have caught his fingers?
A. If it was five feet, it would hit the guard rail, but there is no position you could put the car in that it would catch it.
Q. Noticing this chalk mark where it is four feet, and supposing the guard rail to be of that width, there would be plenty of opportunity for the guard rail to be the proper height and still for a man to catch his fingers when the car upended?
A. Not four feet. If that is four feet marked there. If you put it five feet, he can catch his fingers.
Q. You understood the question?

The Court: Assuming that the bottom of the guard rail was four feet, and two by twelve, the top of it would be five feet?

The Witness: That is my idea.

99 The Court: He could still catch his fingers?

The Witness: Yes sir.

Witness excused.

CHARLES F. HAWLEY, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination.

By Judge Sutter:

Q. You may state your name?
A. Charles F. Hawley.
Q. Where do you reside?
A. Bisbee, Arizona.
Q. What is your occupation?
A. Physician and surgeon.

Judge Sutter: Will you admit that the doctor is a physician and surgeon, and qualified to testify as an expert?

Mr. d'Antremont: Yes sir.

Q. Doctor, do you know Frank Tomich?
A. Yes sir.
Q. In the month of June, 1915, did you meet him?
A. Yes sir.
Q. In a professional way?
A. Yes sir.

Q. He called on you, did he?

100 A. Yes sir.

Q. Did you examine his right hand?

A. I did.
Q. Made a careful examination of it?
A. Yes sir.
Q. For how long a period did you have him under your care?
A. I saw him at intervals from June to August, 1915.
Q. Just describe to the jury the condition that you found his right hand in?
A. I found a loss of the hand of the index finger and the second finger at the first joint, and the third finger was taken off a little forward of the first joint.
Q. Describe the general condition of the ends of those fingers as to tenderness or soreness?
A. The ends of the fingers, the first three fingers were very tender. He could not bear any pressure of touching them at all.
Q. Did you ask him any questions about his condition?
A. Yes sir.
Q. What did he tell you?

A. He told me that he suffered continual pain in them.

Q. Did he describe that pain?

A. Yes sir, he said that it felt as if there were pins and needles sticking in the ends of the fingers.

Q. What would you say caused that condition of the ends of the fingers? That is what is it that brings about that condition of the ends of the fingers?

101 A. The nerves. In this case the nerves were caught in the scar tissue covering the ends of the fingers.

Q. What is the result of that?

A. Pain.

Q. Is that pain constant or only at intervals?

A. It is constant. It grows worse.

Q. It grows worse all the time?

A. Yes sir.

Q. What effect, if any, does it have upon the patient's sleep?

A. It is apt to make him wakeful.

Q. Now, with the ends, or with the fingers in the condition that you found the fingers of the plaintiff in, would you say that he was able to work at his occupation of mining and carman?

A. No sir, not without considerable pain.

Q. It would be painful all the time, would it?

A. Yes sir.

Q. Is there any way of relieving that condition?

A. In my opinion, yes.

Q. Tell the jury how that condition can be relieved?

A. Another operation could be done on those fingers, cutting them off a little further back, clipping the nerves very short, making a little larger patch of flesh over the end of the bone.

Q. Now, what would be necessary in performing that operation?

A. He would have to take anesthetic, and the operation

102 performed.

Q. And what would be the approximate period that he would be disabled from the use of the hand after the operation was performed?

A. In my opinion, he might be able to go to work in about three months.

Q. In about three months after the operation was performed?

A. Yes sir.

Q. Would that operation be painful?

A. He would be under the influence of an anesthetic and he would not feel it.

Q. After he came out from under the influence of the anesthetic, would there be any pain connected with it.

A. There would.

Q. For what period would that pain last?

A. Until the wounds were healed.

Q. Approximately how long would you say that would be?

A. It is very hard to tell. Those wounds should be well healed in four weeks.

Q. Is there any danger from that operation of blood poisoning or anything of that sort?

A. There is always. Always dangers when a person takes an anesthetic.

Q. Always running a risk when you take an anesthetic, are you?

A. Yes sir.

103 Judge Sutter: I think that is all with this witness.

The Court: Cross examine.

Cross-examination.

By Mr. D'Antremont:

Q. What risk do you run in taking an anesthetic, doctor, if you are in good shape physically?

A. There is always danger from chloroform or ether or any anesthetic.

Q. You are speaking theoretically or practically?

A. Practically.

Q. How many men have you had die in that condition?

A. Never had one.

Q. Never had one?

A. No sir.

Q. What results have you had that leads you to think there is danger?

A. Those drugs are depressing to the heart.

Q. If a man was a robust man, is there apt to be the slightest effect upon his system?

A. Certainly, he is generally sick; sick at his stomach.

Q. Sick at his stomach when he comes out?

A. Yes sir.

Q. I mean is there any dangerous result from having taken the anesthetic?

A. No sir.

Q. So far as that goes, there is practically no danger?

A. Yes sir.

104 Q. All the results are, a person is nauseated after he becomes conscious?

A. Yes, as a rule.

Q. What is this blood poison, in case the fingers are improperly handled?

A. If the operation is done in an absolutely antiseptic manner, the danger would not be great.

Q. Would you conduct an operation in any other than an absolutely antiseptic manner?

A. No sir.

Q. Did you ever hear of a case in which a competent physician operates on a man and he has any blood poison after the operation?

A. No sir.

Q. So the risk of blood poison is practically negative, if it is properly handled?

A. Yes sir.

Q. Now, did this man talk to you in English when you examined him?

A. Beg pardon.

Q. Did this man talk to you in English when you examined him?

A. Yes sir, broken.

Q. He speaks pretty good English?

A. Yes sir.

Q. You talked to him very generally, without an interpreter?

A. There was always an interpreter with him, but I could understand what he said.

105 Q. He could understand you?

A. Yes sir.

Q. You talked to him about the fingers, and the usual things in regard to that?

A. Yes sir.

Q. Now, can you tell by looking at a man if his fingers are sore?

A. Sometimes.

Q. What does a man look like when his fingers are sore?

Judge Sutter: Do you mean the man or the fingers?

Q. What does a man, his face look like, when his fingers are sore? Is there any expression in his face?

A. Not when I looked at him.

Q. Did this man look like he suffered from the loss of sleep?

A. Not especially.

Q. What are the usual effects of a man losing sleep from pain like shooting needles in his fingers? How does that show in his face?

A. His face would be drawn; his expression would be drawn.

Q. Would it be lack of color?

A. Sometimes.

Q. Eyes look very heavy?

A. Yes sir.

106 Q. Very noticeable?

A. If he lost a good deal of sleep, yes sir.

Q. And if he had those shooting pains constantly, he would be pretty apt to lose sleep?

A. Yes sir.

Q. He would be pretty apt to be haggard and pale?

A. Yes sir.

Q. The way you found those fingers were tender, by looking at them?

A. By touching them.

Q. And then he told you they hurt?

A. Yes sir.

Q. Of course, you know, as a doctor, if you touch a man that is sore, he flinches?

A. Yes sir.

Q. Can you see those nerves?

A. You can't.

Q. It is only a deduction on your part, that those nerves had been in the scar tissue?

A. Yes sir.
Q. And all you know about the tenderness of this man's fingers is what he has told you and what you have observed?
A. Yes sir.
Q. And the flinching?
A. Yes sir.
Q. That could be feigned?
A. It could.
107 Q. If a man were carefully coached, he would know how to do that?
A. Yes sir
Q. Will you state the condition of this man's ring finger, how much of that was gone?
A. The third finger?
Q. Yes?
A. That was taken off a little forward of the first joint.
Q. Is there any finger nail there?
A. A little bit, yes sir.
Q. How far up a man's arm are these pains apt to go?
A. That would vary in different cases.
Q. Would it in any manner affect a man's arm?
A. Not to that extent.
Q. If he had a powerful left arm, he could work with that as well with that, regardless of his right arm?
A. Yes sir.
Q. Would you say that a man who has pain in his fingers from such a result, could do ordinary house work with his left arm?
A. He could.
Q. He could help his wife about her housework?
A. Yes sir.
Q. About this operation, it would be a very simple operation to trim off those nerves?
108 A. Yes sir.
Q. And what would be the approximate cost of it?
A. Surgeons in establishing their fees a great many times take into consideration the financial condition of the patient.
Q. How much would the fee be if a man came to you?

Judge Sutter: A man in the circumstances of Mr. Tomich?

The Witness: One hundred and fifty dollars.
Q. You would charge one hundred and fifty dollars?
A. Yes sir.
Q. He is a poor man?
A. It is worth it to him.
Q. Yes, it is worth it to him. How much would the time be worth to you?

Judge Sutter: We will object. Doctors do not charge like lawyers. He charges for his knowledge.
The Court: Objection sustained.

Q. And then you say after four weeks at the most, the pain would be entirely gone?
A. The wounds would be healed.
Q. And at the most, after three months, he could return to work?
A. Yes sir.
Q. And thereafter he would not suffer the slightest degree of pain?
A. If the operation was performed.
109 Q. If it was properly done?
A. Yes sir.
Q. And proper result obtained, and done under the proper antiseptic conditions?
A. Yes sir.
Q. He might then after that work and use both of his hands in the ordinary course of work?
A. Of course the functions of that hand would be limited by the loss of the ends of the fingers.
Q. It would be slightly impaired?
A. Yes sir.
Q. But with the exception of that, a man would be able to do all the duties of a miner or a carman without any pain or injury or trouble?
A. Yes sir.

Mr. d'Antremont: That is all.

Redirect examination.

By Judge Sutter:

Q. You mean he could do all those duties if he could get a job with his hand in that condition, don't you?
A. Yes sir.
Q. Do you know what the rule is in the Warren district about men with maimed hands getting a job?

110 Mr. d'Antremont: I object, unless he shows that it is the rule.

Q. Do you know anything about that rule?
A. I do.
Q. What is it?
A. A man can't get a job in the mines.
Q. A man can't get a job in the mines with maimed hands or fingers?
A. No sir.
Q. Then this man would not be in a position, with his fingers the way that they are now, to get a job over there under the present rule?
A. No sir.
Q. You were asked about nails remaining on the ends of the fingers, the one finger of this plaintiff's hand. I will call the plaintiff forward.

55

(The plaintiff is called over to the witness chair.)

Mr. d'Antremont: We object to an examination by the doctor at this time.

The Court: On what ground?

Mr. d'Antremont: On the ground it is made under protest. The jury have had an opportunity to see this man.

The Court: Objection overruled.

111 Q. Doctor, I will ask you to look at the first three fingers of this plaintiff's hand, and state whether or not the nails left there or any portion of the nails there are any benefit to the plaintiff's hand?

A. There is just a slight end of the nail on the third fingers. (The witness now makes examination of the plaintiff's hand.)

Q. Is that of any benefit, or will it be of any benefit to the plaintiff?

A. None at all.

Q. If another operation would be performed, would it be necessary to remove that nail?

A. Yes sir, I would remove it.

Q. Look at the second finger, at the nail remaining there.

A. There is none.

Q. Look at it carefully. What is that? (Indicating.)

A. I would say that is scar tissue.

Q. Scar tissue? Look at the end of the first finger carefully and see if there is any nail there?

A. I would say that was scar tissue.

Q. Scar tissue?

A. Yes sir.

Q. Then the portion of the nail that is left on the third
112 finger is useless to him, is it not?

A. Yes sir.

Q. Is it not a fact that it is a detriment to him? Would catch on things?

A. Yes sir.

Q. And should have been removed, shouldn't it, at the first operation?

A. Yes sir.

Judge Sutter: That is all.

A Juror: According to your opinion, if I am permitted to ask.

The Court: Go ahead and ask the question.

Juror: According to your opinion, do you think this operation is performed right?

Judge Sutter: I avoided that myself. There is no objection to the juror asking it.

Juror: You stated in your testimony——

Judge Sutter: Answer the question, doctor.

The Witness: I would not have taken the finger off at the joint and made a little thicker pad over the end of the bone, and also slipped those nerves a little shorter.

Examination.

By Members of the Jury:

Q. Well then, according—What we are trying to get at, ac-ording to your belief, if this patient had come before you instead of the doctors that he went to—you are a private physician, I presume?
A. Yes sir.
Q. What I would like to get in my mind, according to whether this patient come to you, you would have performed a different operation, would you?
A. No sir.
Q. You would have performed the same identical operation that he now has?
113 A. Yes sir.
The Court: Would you have performed it in the same manner?
The Witness: Not quite, no sir.

The Court: Understand, Mr. Juror, these are delicate questions to ask one physician in regard to another.

Q. What I was trying to get at, he stated that this witness, if his fingers were cut different, he could use them to a better advantage.
Judge Sutter: That is a fact, isn't it doctor?
The Witness: Yes sir.

Recross-examination.

By Mr. D'Autremont:

Q. Don't our finger nails catch on things?
A. Yes sir.
Q. So far as catching on things it would be better if he had no finger nails?
A. No sir.
Q. They help protect us to some degree?
A. They help us in picking up small objects.

The Court: Is that all?
Mr. d'Autremont: No sir.

Q. Where have you learned this rule in the Warren District that would prevent a man from getting a position if his fingers are in the condition this man's are?
A. I have heard it mentioned by the surgeons representing the mining companies.
Q. Do they hire the men?
A. No sir.
114 Q. All they do is to pass upon their physical condition at the time?
A. Yes sir.
Q. You never talked to any foreman of the mines who hired men?
A. No sir.

Q. You never heard it stated that if a man worked three years for the company and had his fingers pinched off he could come back to his old work?

A. I have heard the man say so.

Q. If he had been employed by the company a long time?

A. Yes sir.

Q. Did he work for the C. & A. Mining Company?

A. I could not say.

Q. Did he work for the Superior & Pittsburg Copper Company?

A. I don't remember.

Q. Do you know that each particular shaft has its foreman who does the hiring of the men for that particular shaft?

A. Yes sir.

Q. Do you know that their word is final on hiring the men?

A. I don't know that.

Q. You don't know that?

A. No sir.

Q. Would you be sure that that was a fact if a man who had been employed and had been so injured could never obtain a position in the Warren District again?

A. No sir.

115 Q. You didn't say that?

A. No sir.

Q. This was merely a conversation that you heard?

A. Yes sir.

Q. Do you know at this time there are men employed in the mine whose fingers are off.

A. I don't know of any.

Q. Do you know it to be a fact that there are no such men?

A. No sir.

Q. Did you ever make an operation in your life, doctor, that might not have been done differently?

A. Yes sir.

Q. And which, after a certain result had developed, another doctor examining that same patient, might say, after it was all done, had you done so and so, the result might be different?

A. No sir.

Q. Do you say it is a mark of incompetency on the part of the surgeon?

Judge Sutter: I have not said it was incompetency. I realize that any doctor, no matter how good he would be, might make a mistake, the same as a good lawyer, and I really ought to object to it.

The Court: Do you object?

Judge Sutter: No, I won't object.

Q. Would you say, in any way, this man's fingers show the result of incompetent treatment?

A. No sir.

116 Q. If Dr. Shine and Dr. Bledsoe examined this man and said everything had been done properly to this man, would you say that perhaps they were wrong?

A. I would.
Q. You would say that something would still be wrong?
A. Yes sir.
Q. At the time this operation was done which made this result, if all practical care and attention had been given in the practice of surgery, unforeseen results could be obtained?
A. They could.
Q. And a man doing things in a proper and skillful manner might at times obtain unsatisfactory results?
A. Yes sir.
Q. And it would be no sign of incompetency or lack of skill.
A. No sir.
Q. And if—take the ends of a man's fingers might—fifteen months afterwards, might the same results have been obtained?
A. If I had done the operation?
Q. Yes sir.
A. Yes sir.
Q. So it can't be said it would be at all a lack of skillful application?
A. No sir.
Q. But at this time it is easy to see and say what might have been done?
A. Yes sir.

Mr. d'Autremont: That is all.

117 Redirect examination.

By Judge Sutter:

Q. But was not done?
A. Yes sir.
Q. In other words, you would say that there was probably a mistake made here, instead of incompetency? The same mistake that you or any other surgeon might make?
A. Yes sir.
Q. But the result of that mistake still exists?
A. Yes sir.

Recross-examination.

By Mr. D'Autremont:

Q. Which might be removed by another operation?

Judge Sutter: We admit that.
The Court: So I understand.

Witness excused.

118 H. H. HUGHART, being called as a witness on behalf of the Plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination.

By Judge Sutter:

Q. You may state your name.
A. H. Houston Hughart.
Q. Where do you reside?
A. Tombstone, Arizona.
Q. What is your profession or occupation?
A. Physician and surgeon.

Judge Sutter: Do you admit that he is competent to testify as an expert?
Mr. d'Antremont: Yes sir.
Judge Sutter: Let the record show that it is admitted he is competent to testify as an expert.

Q. Doctor, night before last, on the 14th I think it was, 14th of February of this year did you examine this man sitting over there, Frank Tomich, the plaintiff in this case?
A. Yes sir.
Q. Examine his right hand?
A. Yes sir.
Q. Did you examine that right hand again last night?
A. Yes sir.
Q. Gave it a careful examination?
119 A. Yes sir.
Q. The first time you examined the hand, there was no interpreter present, was there?
A. No sir.
Q. Last night was there an interpreter present?
A. Yes sir.
Q. And did you discuss the hand with the plaintiff through an interpreter last night?
A. Yes sir.
Q. From your examination, and from your conversation with the plaintiff, I will ask you to describe what the condition of that hand was as you found it?
A. Why, he had had the index, the middle and the ring finger, the first three fingers on his right hand amputated at the first joint, they call it.
Q. Was the third finger amputated at the first joint, or just beyond the first joint?
A. They were all amputated about the first joint, because they all had some remains of the nail on them.
120 Q. The third finger was not amputated——

Mr. d'Autremont: Just a moment.

Q. Now describe the condition of those fingers?
A. The nerves have been incarcerated in the scar tissue, the nerve ends, and have left his fingers, in the condition of what they call nervous neuritis.
Q. And what is the result of that condition of the patient?
A. Causes him to suffer from neuralgia, and makes the ends of his stumps sensitive and painful. He can't do anything with it. If he touches anything it goes through him like an electric shock or nerve pain.
Q. And describe that pain?
A. Well, I never had it, but the text books describe it as a very severe pain.
Q. Did you touch the end of his fingers?
A. Yes sir.

121 Judge Sutter: I will call the plaintiff forward.

(Plaintiff comes forward to near the witness chair.)

Q. Now, just take the plaintiff's right hand.

(The witness takes hold of the plaintiff's right hand.)

Mr. d'Autremont: I object to further examination.
The Court: Overruled.

Q. And show the jury what effect touching the ends of those three fingers has on the plaintiff.

Mr. d'Autremont: I object to any further demonstration. He has had that two or three times.
The Court: Objection overruled. Proceed doctor.

Q. Demonstrate to the jury, doctor.
A. The ends of his fingers are so sensitive that anything touches them, although it be the slightest touch, he involuntarily, the muscles involu-tarily contract in his fingers, and run all around like electricity shocking him.
Q. Could that be found by an expert touching it. In other words, can he draw them back himself?
A. No, hardly. It is something over which he has no control. It hurts him to straighten them.
Q. What causes that condition, doctor?
A. As I said before, it is due to the nerves being tangled, in the process of healing, in the scar tissue. The scar tissue in contracting has caused the neuritis.
Q. Could that be remedied in any way?
A. Yes.
Q. How?
122 A. By amputating his fingers higher up, and clipping the nerves off short enough to get them away from the healing process; they would not be involved in it.
Q. Describe what operation would be necessary; what would be necessary to do?

A. Well, he would have to have a general anesthetic and have his three fingers amputated.

Q. Not the whole of the three fingers?

A. No, just from there (indicating on plaintiff's hand) up, away from the—far enough away from the stumps to get a good flap.

Q. Would that operation be painful?

A. It would be without an anesthetic.

Q. But you would give an anesthetic, would you?

A. Yes sir, you would have to have a general anesthetic to have three fingers amputated.

Q. And after the recovery from the anesthetic, would there be any pain suffered?

A. Yes, suffer some pain.

Q. How long would it take those fingers to heal?

A. It would be six weeks or two months. They would heal in two weeks, but still be tender, of course.

Q. About how long would it be before he would be able to work?

A. If he had no complications or anything of the kind, he ought to be able to work in two or three months.

Q. Would the loss, then, of the ends of those three fingers as they would be in after the second amputation, interfere with his work?

123 A. Oh yes, it would decrease the utility of his hand quite a bit.

Judge Sutter: That is all.

The Court: Cross examine.

Cross-examination.

By Mr. d'Autremont:

124 Q. You made a careful examination of this man, doctor?

A. Yes sir.

Q. Did he have a part of his nails there?

A. Nail on the end of each one of his fingers.

Q. You are sure of that?

A. Yes sir.

Q. Nail on each one of his fingers?

A. Yes sir.

Q. You are just as sure of that as you are anything else?

A. Yes; there is not all of any nail. Some of the nail left on each one.

Q. If the other doctor says that was a part of the scar tissue, you would say that was a part of the scar tissue?

A. Yes, they might call it anything they wanted to.

Q. If a doctor told you it was a part of the scar tissue, would you question his good judgment?

A. Yes sir, I would have to have a microscopic section of it to prove to me that it was scar tissue.

Q. You would not think very much of his judgment?

A. I would not on that point.

Q. On that part of it?
A. On that part of it.
125 Q. If he did, what would you think of it?
A. They might not be honest in calling it scar tissue.
Q. If a doctor examined those fingers from June until August and called it scar tissue, would you think that he had overlooked something?
A. I think that he didn't see that he had some nail on his fingers.
Q. So all doctors can never agree?
A. Oh, they agree on a great many things.
Q. On a great many things, and they constantly disagree on some others the same as any other professions?
A. I don't know about that. I think they have a very harmonious professional career.
Q. You might disagree on what might be a scar tissue and a nail or would any two equally good physicians know a nail when they would see it?
A. Oh yes, they would know a nail.
Q. Very confident?
A. Yes sir.
Q. Now, can you see those nerves?
A. No, not now.
Q. Could you at any time?
126 A. You could by opening them up.
Q. They are amputated?
A. Yes sir.
Q. They are now embedded in the scar tissue?
A. Yes sir.
Q. No nails in that part?
A. No, the nail does not go down. Simply some of the walls of the nail bed was left, and afterwards began to grow.
Q. This anesthetic, would you use an anesthetic?
A. Ether or chloroform, depending upon the man's heart and kidneys.
Q. Is there any danger from that?
A. Yes sir.
Q. Did you ever have anybody die on you?
A. No, I never administer an anesthetic very much.
Q. During the course of an operation, have you known of a normal healthy man dying under the influence of the anesthetic?
A. No sir, I have never been so unfortunate as to mix up in an operation where the patient died under the anesthetic.
Q. So it is considered nominal?
A. It is considered as a hazard to be taken into consideration on any operation, and not to be administered unless the warrant
127 of—unless the necessity of the operation would warrant that hazard.
Q. And if any other doctor said to you the danger was not very much, would you dispute him?
A. Yes sir.
Q. Now, about the pain, the pain running up this man's left arm,

wouldn't it affect his right arm—up his right arm, would it affect his left arm in any way?

A. After while, it would cause general neuritis.

Q. In his head?

A. Yes, it would affect his sensitive nerves all over.

Q. All over his body?

A. Yes sir.

Q. Would it eventually paralyze?

A. No, it is not the motor nerves that are involved.

Q. If he would stub his toe, would that hurt him?

A. Yes, of course it would hurt him if he stubbed it hard enough.

Q. Would that hurt his fingers?

A. No, it would have a nervous influence. It is a little more sensitive.

The Court: You mean, substantially, that the persistent radiation of the nerves, such as you speak of would create a sympathetic
128 influence on the sensory nerves?

The Witness: Yes sir.

Q. A general debility?

A. No, general hyper-sensitiveness.

Q. Something like smoking too much or some such thing?

A. Yes.

Q. How long after this man came out of the anesthetic, how long did you say the pain would last?

A. Why, it depends on the result of the operation. If it was properly performed, the flaps were not too tight, and the nerves were clipped off short enough to be away, the pain would not amount to a great deal.

Q. Would not amount to a great deal?

A. No sir; it would hurt some, cutting those nerves, especially in a man who has neuritis.

Q. How many days?

A. I could not say.

Q. Few days?

A. Few days.

Q. Heal up, you said, in practically two weeks?

A. It would heal by first intention. It would be practically healed in ten days or two weeks.

Q. You don't think it would take four weeks?

A. For the actual process of healing, no.

129 Q. And when could he go to work?

A. Well, that is something that is difficult to say.

Q. Well, about?

A. It depends on how much amputating of the fingers would be necessary as a certain proposition. If he had enough flap to give him some stumps that were covered, skin over the bone to keep them from being sensitive, after the newness wore off the skin that was over the ends of his fingers, he ought to be able to go to work in a couple of months.

Q. If the operation was properly done, would he ever have to suffer any pain at all?

A. No sir.
Q. And would become as hard as any other part of the hands?
A. They would always be sensitive. He would not have the protection of the normal end of the nail.
Q. The other part?
A. The other part of his fingers, except the very ends.
Q. Did you ever have a man complain to you, after the ends of his fingers were amputated of tenderness?
A. Yes, the ends of them are always more or less tender and they suffer from cold.
Q. From cold?
A. Yes sir.
Q. The same as we do when our fingers are cold?
A. Yes, only they get cold at a great deal higher temperature than the normal fingers.
130 Q. Now, about what would the cost of this operation be?
A. It would depend. I have done it for nothing many a time.
Q. For a man in moderate circumstances in life, a competent physicia-, what would the cost of the operation be?
A. If you will allow me, I will consult the scale of fees.
Q. Have you a scale of fees?
A. They are fees that are generally used among the ordinary run of every day physicians.
Q. I mean for a laboring man?
A. Yes sir.
Q. There is a fixed fee?
A. Yes sir.
Q. Who fixes it?
A. Why, the county, state and national medical associations.
Q. Fix the fees for such operations?
A. Yes sir.
The Court: Do you mean they fix it as an absolute fee?
The Witness: No, they recommend it as the proper basis, so if a man comes in and cuts off a finger for fifty cents he is a piker,
131 and if he charges three hundred and fifty dollars, he is a grafter.
Q. It is to your interest to keep the fee up?
A. Yes sir.
Q. Not to do any more than possible for fifty cents?
A. No.
Q. Not to do charity work?
A. No, you are not in the country for your health.
Q. But you insist, upon an examination of this hand, that he still has feeling?
A. Yes, he has feeling.

Mr. d'Antremont: That is all.

Redirect examination.

By Judge Sutter:

Q. Point out and show to the jury the nail on his finger.

(The plaintiff comes forward to the witness chair, and the witness indicates.)

A. He has a piece of nail on this finger.

Judge Sutter: That is all.

Witness excused.

132 WILLIAM McDONALD, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

Direct examination.

By Mr. D'Autremont:

Q. Will you state your name please?
A. William McDonald.
Q. Where do you live, Mr. McDonald?
A. Upper Lowell.
Q. Where do you work?
A. Cole Shaft.
Q. Where were you working on November 9th, 1914?
A. I was working at the Cole.
Q. What level were you working on at that time?
A. Nine hundred, working probably two or three sets above the nine hundred, but on the nine hundred.
Q. Do you know Frank Tomich, the plaintiff?
A. Yes, I know the man, but I don't know his name.
133 Q. You have known him for sometime?
A. Yes sir.
Q. How long have you known him?
A. About two or three years I have known him.
Q. Was he working on the same level with you on November 9th, 1914?
A. I don't know when that was?
Q. The day of the accident?
A. Yes, he was on the nine hundred.
Q. Do you recall an accident to Frank Tomich on that date?
A. Yes sir.
Q. I will ask you to state in your own words to the jury all that you know about this accident?
A. Well, all I know about the accident, I was standing, I guess probably ten or twelve feet away, and he come along up with the car. I don't know whether I had taken a drink of water, but I know I had gone to get a drink of water, and he come by this car, and I heard the car, I heard the dirt start rolling out of the car, and

I heard the car make a big noise, and I thought it was some accident, and I heard him holloa, and when I turned around he was close to me, only a step or two and we met right there.

Q. What was he doing when you saw him?

A. He was walking right towards me, shaking his hand that way (indicating) and holloing, whichever hand it was, shaking his hand and holloing.

Q. About how long was it between the time you heard the car hit the chute and the time you heard him holloa?

134 A. It would not be a second. It seemed to me it was all at once, as the car dumped he holloed. I heard this dirt rolling, and it would not be but a second or two.

Q. And what did you do?

A. I started when I heard him, I turned around and probably made two steps and we met right there.

Q. And about how far was he standing from the place where the car was?

A. I would judge not over ten or twelve feet.

Q. Then, what did you do?

A. Well, I didn't do anything. About half a minute or so the shifter come right up, and he taken right hold of him. I don't know if I had taken hold of his arm or not. It was so quick. The shifter was right there, and he taken hold of the hand.

Q. What shifter was it?

A. Murphy, Thomas Murphy.

Q. And then what did you do?

A. Well, he walked right out of the drift holding to his hand, and I walked along by him. I took Frank's coat and bucket, and walked along by him out to the station. There they tied up his hand, and I went back to work.

Q. Did you leave him at any time between the time of this accident until you got to the station with him?

A. No, I was walking right behind him right out.

Q. How long was it before Murphy got to him, between the time that the car hit and the time that Murphy came up to him?

135 A. Well, I don't think it would be over a minute. He had about one hundred and fifty feet to walk over, I suppose. I think he run. I don't know whether he walked or not. He was there it didn't seem to me like a minute. He was right there so close, I could not say just how long it was.

Q. Now, will you describe to the jury by standing up, the position that you were in at the time that you heard the car hit, and what you did afterwards?

A. Yes.

Q. Say the chute was in here (indicating) where were you standing in relation to the chute?

A. Standing about as far away as that place (indicating).

Q. About this far?

A. Yes, my bucket was standing here (indicating).

Q. You had your back to the chute?

A. Yes sir.

Q. Show the jury what you did?

A. I—when he holloed, I turned around like that (indicating) and met right here (indicating). Probably half the way. I made only a step or two until we met, that is all.

Q. Now, you say the time you seen him between the time the car hit, and the time you touched him was what?

A. I might have laid my hand on his shoulder. Murphy was there so quick, I didn't know just what to do, and he was right there and I taken hold of his wrist.

Q. You didn't turn and leave him?

136 A. No sir.

Q. Now, describe this place on the nine hundred level. I will ask you a few questions. How far away from the chute where Tomich was loading to the chute where he was dumping?

A. I don't know exactly.

Q. Approximately?

A. I don't think it would be over fifty, probably fifty-five feet, but I don't know exactly.

Q. Was it a perfectly straight track?

A. Yes, it was a straight track?

Q. There were no turns?

A. Of course, the track might not have been exactly straight, but there were no turns in the drift.

Q. Straight track?

A. Yes sir.

Q. Was there a crosscut running at right angles?

A. There was a cross cut come across in front of the chute.

Q. Did that also have a track in it?

A. Yes, had a track in it. It didn't have all the way out to the main drift, but there was a track right there. I don't think there was a track to the main drift. I am not sure. I was away from it a ways at that time.

Q. Have you ever dumped cars at that place?

A. Yes, I dumped some cars there.

Q. Loaded from the same chute and dumped in the same chute?

A. They had a chute on the right, and had one on the left, and I loaded some on the left. I don't remember whether I loaded any out of the right or not.

137 Q. Now, about how much grade was there in that track from the chute down to the chute where he dumped?

A. Well, I don't know just what the grade was. There wasn't any grade at all about half way, and then there was a grade that the car would run down. You would have to hold back on it a little.

Q. About how fast would the car run; how much strength would you have to push upon the car, if you were pushing it ordinarily?

A. How much strength would I put on it to hold it back?

Q. Yes.

A. I don't know.

Q. Would you have to strain?

A. No, I would have one hand on the car and the other up against the post, so that it would ease up against the bumping board. I

never like to hit them bumping boards. I don't like to hit them bumping boards. I suppose that when anybody is used to it, they run anyway.

Q. Did you ever see a car on this level at any time with a lever throwing from left to right?

A. I never did.

Q. Did you ever see any car that way?

A. I never did, no sir.

Q. Now, this chute that you were dumping ore down, there was a dumping board on the bottom?

A. Yes, a dumping board.

Q. And protection bars?

A. Nailed up to keep the car, I suppose, to keep the car from going over. That is what I call them, the bumping board, it is about four feet.

138 Q. About how wide was that?

A. Which, the bar above or the one below?

Q. The board below—the board above?

A. They are two by ten or two by twelve; they generally use them.

Q. About — high up was it?

A. About four feet, I guess. Probably four and a half. I don't know for sure. I could not say. I never measured the bar and never nailed it on. I would not know how high it was.

Q. About ten feet from the shaft, from the chute, what is the condition of the track there?

A. The track was al- right outside of this little grade that started, probably the car was right about fifteen feet from the chute, as well as I can remember, but from where you started the car, I had to push. There was no grade where you started the car that I could tell.

Q. Now, did you ever have any difficulty about making Mr. Tomich understand?

A. In talking?

Q. In talking?

A. No, not much.

Q. You never talked to him very much?

A. Well I have talked to him quite a few times and he could always understand.

Q. Now, did you see Tomich when he returned to work?

A. I seen him the morning he returned on the surface.

Q. On the surface?

A. I don't remember whether I seen him under ground or not.

139 Q. Did you talk with him?

A. Yes sir.

Q. When, after that, did you see Mr. Tomich?

A. I don't remember if I seen him around Lowell, but he came up to the house one day.

Q. Did he come up to your house?

A. Yes, he came up to my house.

Q. Did he have an interpreter with him?

A. No sir.
Q. What did he say to you when he came to your house?
A. He wanted me to go to Bisbee.

Judge Sutter: Now, we object to what he said to him when he came to his house.
The Court: What the plaintiff said?
Judge Sutter: Yes.
The Court: Objection overruled.

Q. What did Mr. Tomich say to you?
A. He said there was a fellow at Bisbee, he wanted me to see that fellow.
Q. Did he tell you the name?
A. Louie something.
Q. Called him Louie?
A. I don't know whether he said Louie or said his last name, I won't be sure which.
Q. Was it Louie Roscoe?
A. I know the man; he was the man here yesterday.
Q. You saw him yesterday?
A. I seen him around here yesterday.
Q. He is around here now?
A. Yes sir.

140 Judge Sutter: We will admit that it was Louie Roscoe.
The Court: Very well, it is admitted.

Cross-examination.

By Judge Sutter:

Q. He told you that Fred Sutter, the attorney at Bisbee wanted to see you to see what you knew about the case?
A. Yes sir, Louie told me he wanted me to meet Mr. Sutter, and I was up at Bisbee, and he said he wanted me to go and see this fellow, and I went over to see Louie and he told me.
Q. To come up to see me. I am Sutter.
A. If you are Sutter. I was pretty tired, and didn't go.
Q. Louie didn't come back to see you?
A. Louie was down at the house afterwards. I wasn't there.
Q. If you were not there, how do you know he was?
A. My wife told me.
Q. Anything that was told you would be hearsay testimony. It is only what you know yourself. You never came to see me, and after that you never had any further conversation with Louie Hoscoe, did you?
A. No.

Judge Sutter: That is all.
The Court: Is that all, Mr. d'Autremont?

Redirect examination.

By Mr. d'Autremont:

Q. Was there a turn sheet in front of the chute?
141 A. Yes, there was a turn sheet there.

Mr. d'Autremont: That is all.
Judge Sutter: That is all.

Examination.

By Members of the Jury:

Q. Are you employed by this company now?
A. Yes sir.
Q. At the present time?
A. Yes sir.
Q. Does your testimony in this case have any bearing on your position?
A. No sir.
Q. You would not be afraid to testify in this case either for the plaintiff or the defendant?
A. It would not make any difference to me.
The Court: Has anybody ever asked you to testify?
The Witness: No sir.
Judge Sutter: I think Mr. McDonald tried to testify to the truth.
Mr. d'Autremont: What did I tell you to testify to when I talked with you about it this morning?
The Witness: To testify the truth and nothing else.
Judge Sutter: I don't believe Mr. d'Autremont would tell him anything else.
The Court: That is all.

THOMAS A. MURPHY, being called as a witness on behalf of the Plaintiff, and having been duly sworn according to law, testified as follows:

142 Direct examination.

By Mr. d'Autremont:

Q. What is your name, Mr. Murphy?
A. Thomas A.
Q. Where do you live?
A. Bisbee.
Q. Where do you work?
A. Cole Shaft.
Q. What is your position?
A. Shift boss.
Q. What were you doing on November 9th, 1914, what position did you hold then?
A. Shift boss.

Q. Was the nine hundred level part of your run?
A. Yes sir.
Q. Do you remember the plaintiff, Frank Tomich?
A. Yes sir.
Q. Was he one of your men?
A. Yes sir.
Q. Do you recall the accident to him on November 9th, 1914?
A. Yes sir.
Q. Will you state just in your own words all you know about it?
A. Well, Mr. Thomas was running a car there to what we call the Sixty-two feet. I should judge it was something like thirty feet from the Fifty-four Raise, and we went down to the ten hundred and came up to the nine hundred, and while he loaded this car, he run it out there——

143 Judge Sutter: Now, wait, Mr. Murphy, pardon me for interrupting. Were you there when he loaded this car?

Q. Tell, Mr. Murphy, what you saw?

Judge Sutter: Actually yourself.

The Witness: Well, he certainly loaded the car.

The Court: State what you saw.
Judge Sutter: Not what you presume.

Q. Just what you saw?
A. Well, I didn't see him dump the car but as I came from the Forty-eight Stope, and just as I got down there, I heard him holloa and I rushed out there, and when I got out there he was holding his hand, shaking it like this (indicating) and holloing like that, and I says "Frank don't look at it," I says "don't look at it," he was looking at his hand, and I took him out to the station and I bandaged it up. The car at this time was dumped up at the chute. This guard rail was on top there, and I didn't notice just exactly how the car was against this guard rail, but I was under the impression——

Judge Sutter: Now, don't state your impressions. State the facts as you found them, Mr. Murphy.
The Witness: I am stating as near as I possibly can.
The Court: Just state exactly what you saw there, Mr. Murphy.
Judge Sutter: No impressions.

Q. State your best recollection of what you saw.
A. That is my best recollection, and I took him by the wrist and held his wrist here (indicating) and took him out to the
144 station and administered first aid to him, and sent him to the hospital; the doctor.
Q. How long did it take you between the time you heard him holloa until the time you got there?
A. Not more than forty seconds.
Q. Whom did you find there with him when you got there?

A. Mr. McDonald, a timberman. He was timbering on the stope and had been down there.

Q. Tomich and he were together?

A. Yes sir.

Q. You didn't stop to examine his feet?

A. No sir.

Q. Now, can you state about this place of the accident, was the track—what shape was the track in?

A. Well, it was in good shape.

Judge Sutter: "Good shape," what is that?

Q. What do you mean by "good shape"?

A. Well, it was virtually a new track. Now, I don't think that track had been in more than ten days or probably two weeks, not more than that, and this raise is supposed to come right up alongside of the crosscut, but we missed it about two feet, consequently got a pretty long set in there; instead of having a five foot set we had about a seven foot tap in there. This Fifty-four Raise, that comes up alongside of the One hundred and sixteen cross cut was supposed to come up on the edge of the cross cut, but we missed it about two feet, so instead of having a regular set in there, we had a seven foot tap.

Q. Is that all you wanted to say?

145 A. Well, this track runs right over here, and the car dumps right at this dump, and has about a two foot slide into the chute instead of going right over to the chute to dump, there is a little bit of a slide in there where this muck is rolled down into the mouth.

Q. The track went to the mouth of the chute?

A. Yes sir.

A Juror: Right at the end of the track?

The Witness: Right at the end of the track. This track run right over to the chute, and the guard rail over there, and the bar on the bottom, so that the car, the wheels of the car strike that bar on the bottom, and when it does that the guard rail on top would catch the car there and turn it over, or keep it from turning clear over?

Q. What is the height of the guard rail, about?

A. Well, about four feet, I should judge.

Q. Did I ever ask you about this guard rail at all?

A. No sir.

Q. You don't recall me ever asking you a question about that guard rail?

A. No sir.

Q. What is that guard rail made of?

A. Well, if I remember, it is two inch lagging.

Q. Put across?

A. Nailed right across.

Q. In your experience—did the company at that time have any cars which dumped with the lever throwing from left to right?

A. With the lever throwing from left to right?

Q. Yes, that you dumped with your left hand?

146 A. No sir.

Q. Did you ever see a car that dumped that way?
A. No sir.
Q. Now, is there any grade in this track between the two chutes, where you loaded until you come to the chute where you dumped it?
A. There was a little grade.
Q. About how much was that?
A. Well, that probably would be maybe seven inches in a hundred feet.
Q. Was there ever any danger of a car running away down that grade?

Mr. d'Autremont: You admit he is a good miner?
Judge Sutter: Yes, good miner.

Q. Did you give instructions to the carmen?
A. Yes sir.
Q. What are your instructions to the carmen as to dumping their car?
A. Well, that depends on the conditions. Of course, some places, we have a side dump.
Q. When you say "side dump", you mean dumping sideways into the chute?
A. Dumping sideways into the chute.
Q. Yes?
A. The handles on the car, I have constructed many of them, when they strike this rail on the bottom, and you throw this lever off and the impact of the car will go over there; will save them from doing any lifting, and the car will naturally dump itself.
The Court You mean you throw this lever a little before you strike.
147 The Witness: Yes, just before they strike, and the car will naturally dump itself.
Q. You have the discharging of the men, have you not?
A. Yes sir.
Q. If a man had worked three years for the company, and he would accidentally dump this car down the chute, would you fire him?
A. No, I think not. It would depend a good deal on the circumstances. If he worked for me that long, I would consider it must be an accident.
Q. You have talked with Tomich?
A. Yes sir.
Q. Did you ever have any difficulty in making him understand?
A. No sir.
Q. Did you see Tomich after he returned to work?
A. Yes sir.
Q. How long did he work?
A. That, I have been trying to think. I can't recall now just how long he did work.
Q. He has not been back since?
A. Since he came back to work after he got his hand hurt?

Q. Yes?
A. I remember the day he went out, he come and told me he was sick, and I told him "all right", and I says "whenever you get ready, come back," but I have never seen him since. I never seen him until I seen him out here today.
Q. Would his position be open to him if he went back?

148 Judge Sutter: We object to that as immaterial.
The Court: Objection sustained.
Judge Sutter: No, we withdraw the objection.

Q. Would Mr. Tomich's position be open to him if he went back?

Judge Sutter: After this law suit?

Q. After this law suit?
A. It is out of my line.
Q. If you had the hiring of him?

Judge Sutter: We object.
The Court: Objection sustained.

The Witness: I don't do any hiring.
Q. While you were walking out to the station with Mr. Tomich, did he say anything to you?
A. I believe I asked him how it happened, "how did you come to catch your hand that way", and he said he had it on top of the car.
Q. Is it a part of your duties to inquire of all men how the accidents happen on your run?
A. Yes sir.
Q. You always inquire?
A. Yes sir.

Mr. d'Autremont: That is all.
Judge Sutter: That is all.

Examination.

By Members of the Jury:

Q. You said awhile ago when the attorneys asked you about this party, you said you were trying to think how long he had worked there. What was your idea of thinking about it? Was this question put to you before that?
A. No sir, not before.
149 Q. Well, what was the idea of your trying to think of it?
A. Well, the idea was simply this——
Q. That you thought it might be asked you?
A. About three weeks ago I was notified I might have to come to Tombstone on the 10th or 11th of February to testify in this case, and I naturally tried to recall all the circumstances connected with it that I could think of so that I would be able to explain it intelligently as I possibly could.
Q. If that guard bar had been four feet would it have been pos-

sible for this man to have caught his hand between the top of the guard and that board?

A. That depends entirely upon where the car dumps.

Q. It dumped when it struck the bumping board?

A. No sir.

Q. It would not have been possible?

A. No sir, but if it run over this guard rail or dumping board, then it might.

Q. Then it would have knocked the dumping board out?

A. Either that or jerked it.

Q. Or jerked it?

A. Yes sir.

Examination.

By the Court:

Q. Supposing the lever had not been thrown, and the car had struck the dumping board without the lever having been thrown, what would then have been the effect?

150 A. The result would virtually be the same.

Q. Could a man who had his fingers on the back of the car, if the car dumped without the lever being thrown so that the whole truck went up in the air, could he then catch his fingers against the guard board?

A. Well, you see, it depends on where the front end of the car is when the car dumps. Now, if the front end of the car has gone sufficiently far so that when the hind end of the car comes up, naturally it would be up under that guard rail.

Q. How wide was this guard rail? How wide did you say it was?

A. It amounts to a two by eight, sometimes two by ten, but usually it is two by six or two by eight.

Q. And set up flatways?

A. Set up flatways, nailed on those two posts. Those two posts are five feet apart, ten by ten timbers, four feet in the clear, and it is nailed on those two posts.

Q. So that the larger surface, the six or eight inch surface would be facing the drift and the car?

A. Exactly.

Examination.

By Members of the Jury:

Q. Do you remember whether the muck was still remaining in the car when you saw it at this time or had it been dumped?

A. After that, I could not say. In fact, I didn't pay much attention to the car when I seen this man and heard him holloa, I took him out to the station and administered first aid.

151 Q. Was there fall enough so that a man would naturally have held on to the car?

A. Yes sir.

Q. There was a raise of seven feet that the car would naturally run itself?
A. No sir.
Q. Seven inches in a hundred feet?
A. No, it won't run.
Q. How much would it have to have before it would run?
A. Well, that would depend on the track and the condition of the track, and the bearing of your cars.
Q. You testified that the track was good?
A. Yes, it was virtually new track.
Q. If it had a seven inch grade, it would run itself?
A. Seven inch grade in a hundred feet?
Q. Yes.
A. No sir.
Q. If it was started?
A. After it was started, yes.
The Court: You mean that the car would not get away by itself if standing still, but if it was started it would continue to run?
The Witness: Well, it might.
Mr. d'Autremont: About how much force would it have to have to go through the bumping board and upend against the chute bar? Could it gather that momentum by coasting down?
A. No, because the run is so short. It is not more than thirty feet, and sixty-two feet across the One hundred and sixteen cross cut.
152 Mr. d'Autremont: It would depend on the grease on the wheels, and all that?
The Witness: Exactly.
A Juror: Could that man have holloed while you were coming up or going down, coming in there to where you was at, and you not heard it?
The Witness: No, I think not. This stope I was in, it was only the first floor above, and I was back in that stope, and just came down, and I just come down as he yelled, and I was not over forty feet.
A Juror: He could not have holloed before that and you not heard him?
The Witness: No.

Cross-examination.

By Judge Sutter:

Q. A carman is told to get a pretty fast move on them, and push these cars fast, aren't they?
A. How?
Q. A carman is told to get a move on them, and push those cars fast?
A. Well, it depends on surface conditions.
Q. They are generally expected to step lively to hold their jobs?
A. Well, a reasonable amount of work.
Q. In other words, they are supposed to push instead of hold back?
A. That depends entirely on the track.

Examination.

By Mr. d'Autremont.

Q. There is no speeding up of those men. They push their cars out and dump them as fast as they can and come back?

A. No, I have told them that we were a little short of oxide
153 for that afternoon, and would like for them to get all they possibly can, but as far as forcing them to do anything or anything like that——

The Court: The motto is "safety first"?

The Witness: Yes sir.

Examination.

By Judge Sutter:

Q. You have told them you have been a little short of oxide, and did you ever tell them when the oxide bins were full that they could lay off a little?

A. Yes sir, many a time.

Q. And they actually laid off?

A. They would not be in any hurry.

Q. Sit down?

A. The carmen, put them along there cleaning track or something like that.

Q. In other words, all they have to do, is to keep to work whenever they have anything to do?

A. Yes sir.

Q. As they used to say when I was in the mines, all they had to do was push the car in, fill it up and push it out again, that is all they had to do?

A. Yes sir.

Witness excused.

GARFIELD ANGOV, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

Direct examination.

By Mr. d'Autremont:

Q. State your name please.

A. Garfield Angov.

Q. What is your occupation?

154 A. Miner.

Q. Where are you working now?

A. Cole Shaft.

Q. Were you employed at the Cole Shaft on November 9th, 1914?

A. Yes sir.

Q. Do you recall finding a dumped car on that day at Chute Fifty four?

A. Yes sir.

Q. State to the jury if you have talked with me about this accident?

A. Sir?

Q. State if you have talked with me about this accident?

A. No sir.

Q. Will you state to the jury just the condition you found that car in on the morning of November 9th, 1914?

A. Yes sir, it was in a square set of timbers with the guard rail, you see, and the dump board at the bottom, and the car was dumped right up against the guard rail, and the hind wheels of the truck was off the track, and the front wheels were still on. It was partly broken through the dump board at the bottom, that keeps the wheels from going into the chute. Of course we pulled it back on the track, and that is the way I found the car, in that position.

A Juror: Was it empty or full?

The Witness: It was empty.

A Juror: You say it was empty?

The Witness: Yes sir, as far as I can recall to memory now.

155 Q. Did you take any particular notice of the car at that time?

A. No, I saw it was dumped up, and we hauled it back on again so that the other fellow could go on running it again.

Q. You didn't know there was an accident?

A. Yes, I was maybe sixty feet away looking for a timber, and I saw him pass, going out with this man, leading him to the station.

Q. Was there somebody with you at that time?

A. My working partner. We both went up together and we put this car on.

Q. Who was your partner?

A. Pasco, Bert Pasco was his name.

Mr. d'Autremont: That is all.

Examination.

By Members of the Jury:

Q. Where was the guard rail, against the car, or the car against the guard rail when you saw the car?

A. The car was against the bottom timbers, and it was partly broken through.

Q. I mean the upper guard rail?

A. It was right in place.

Q. The car was against it?

A. The car was against it.

Q. What part of the car was resting against it?

A. Oh, it was down an inch or two inches maybe from the top rail.

Q. The back of the car?

A. The back of the car.

Q. How high was that guard rail from the ground, the top of the guard rail?

156 A. Well now, they usually put them about four feet high.

Q. This one?

A. I could not tell. That was about the regulation height. I never did measure the height from the track up to it.

Q. You don't know then whether the car was moved then from the time this accident happened until the time you seen it?

A. It had not been touched.

The Court: How long after you say you met the shift boss coming down with this man did you go up to where the car was?

The Witness: About a minute and a half or two minutes.

The Court: You walked right up to the car, and met the shift boss coming down, and walked up to the car and straightened it out, is that the idea?

The Witness: Yes sir.

Judge Sutter: The car was upended, and the hind wheels were off the track?

The Witness: Yes sir.

The Court: Any further questions the jury desire to ask.

Judge Sutter: And the hind end of the car was over against the guard rail?

The Witness: Yes sir, that is what kept it from going into the chute.

Judge Sutter: When I say "the hind end," I mean the back and top?

The Witness: Yes sir.

Judge Sutter: That is all.

Witness excused.

157 (Title of Court and Cause.)

Notice of Filing.

Fred Sutter, Esq., Attorney for Plaintiff.

SIR: Please take notice that the defendant in the above entitled action filed, on May 24th, A. D. 1916, a transcript of the reporter's notes of the trial of the above entitled action, in the office of the Clerk of the Superior Court of Cochise County, at Tombstone, Cochise County, Arizona.

(Signed) KNAPP & D'AUTREMONT,
Attorneys for Defendant.

Dated: May 26th, 1916.

Received a copy of the within notice of filing this 26th day of May, 1916.

(Signed) FRED SUTTER,
J. T. KINGSBURY,
Attorney- for Plaintiff.

Filed: May 27, 1916.

158 (Title of Court and Cause.)

Stipulation.

Whereas, the Reporter's Transcript of the evidence of the trial of the above entitled action was filed in this Court on the 24th day of May, 1916, and whereas, the Defendant herein by its Attorneys has certified that same is correct, and:

Whereas, the Honorable Alfred C. Lockwood, Judge of this Court, is at present absent and away, and the date of his return unknown, now, therefore, it is hereby:

Stipulated and agreed by and between the parties hereto that the time for the signature of the Court herein to the said Reporter's Transcript be and the same is hereby extended up to and until the return of the said Honorable Alfred C. Lockwood, to the County Seat of this County.

FRED SUTTER,
Attorney for Plaintiff.
KNAPP & D'AUTREMONT,
Attorneys for Defendant.

Dated: June 2, 1916.

Filed June 10, 1916.

159 (Title of Court and Cause.)

Instructions Requested by Defendant.

You are instructed, if under all the facts in the case and the law as given you in the instructions of the Court, you come to the conclusion that the plaintiff is entitled to recover some amount as damages for the injuries which he claims to have sustained, you must not render what is known as a quotient verdict—that is you must not add together the sums which you severally may believe the plaintiff is entitled to and divide by twelve, or any other number, for the reason that this method of arriving at the amount to be allowed as damages would be unlawful and the court would be compelled to set aside you- verdict.

Given as modified.

ALFRED C. LOCKWOOD, *Judge.*

160 (Title of Court and Cause.)

Instructions Requested by Defendant.

I.

You are instructed that if you find that the injury to the plaintiff was caused by his own negligence, then you must find a verdict for the defendant.

II.

You are instructed that you must take into consideration the negligence of the plaintiff, if any, in this case, and if you find that the plaintiff was negligent in the handling or dumping of the ore car at the time and place of the injury in this case, that is to say if you find that in the handling or dumping of the ore car, you find that the plaintiff failed to observe the ordinary care and prudence that an ordinary man familiar with the handling or dumping of such cars would have observed under like circumstances, and that such failure on the part of plaintiff to observe such ordinary care, con-
161 tributed to the injury received by the plaintiff, then you are instructed that in proportion, as you find the negligence of the plaintiff has contributed to his injury, you will reduce the amount of damages to which the plaintiff would otherwise be entitled. That is to say, if you should find that the injury to the plaintiff was caused half by a condition or conditions of the employment of the plaintiff, and half by the negligent conduct of the plaintiff, then you should reduce one half, the amount of damages you find the plaintiff has suffered from the injury.

Given.

ALFRED C. LOCKWOOD, *Judge.*

162 (Title of Court and Cause.)

Instructions Requested by Defendant.

You are instructed that unless you believe from the evidence that the injury for which the plaintiff is seeking to recover damages in this case, was due to a condition or conditions of the employment of the plaintiff by the defendant, then you must find for the defendant.

Given.

ALFRED C. LOCKWOOD, *Judge.*

163 (Title of Court and Cause.)

Instructions Requested by Defendant.

You are instructed, that unless you find from the evidence that negligence upon the part of the defendant in this case was the cause of the injury sustained by the plaintiff, then you must find for the defendant, for the reason that there can be no liability without fault, in a case such as this.

Refused.

ALFRED C. LOCKWOOD, *Judge.*

164 (Title of Court and Cause.)

Instructions Given by the Court.

The Court: Gentlemen of the jury, this is an action wherein Frank Tomich, sometimes known as Frank Thomas has sued the Superior and Pittsburg Copper Company, a corporation, for damages sustained by him, personal injuries, alleged by him to have been sustained while he was working for the defendant, corporation, resulting from one of the conditions or hazards arising out of the employment, the action being brought under what is known as the Employers' Liability Law of this State, which I will read to you. Chapter VI of Title 14 of the Revised Statutes of Arizona.

"Liability of Employers for Injuries to Workmen in Dangerous Occupations.

3153. This chapter is and shall be declared to be an employers' liability law as prescribed in Section 7 of Article XVIII of the State Constitution.

3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the State Constitution, any employer, whether individual, association or corporation, shall be liable
165 for the death or injury, caused by any accident due to a condition or conditions of such occupation of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

(1) The operation of steam railroads, electrical railroads street railroads, by locomotives, engined, trains, motors or cars of
166 any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plants, tracks, switches, bridges, roadbeds, upon, over and by which such railway business is operated.

(2) All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

(3) The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require iron or steel framework.

(4) The operation of all elevators, elevating machines or derricks or hoisting apparatus within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

(5) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground of floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

167 (6) All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

(7) All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes.

(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(9) All work in the construction and repair of tunnels, subways and viaducts.

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity or any other mechanical power is used to operate machinery and appliances in and about such premises.

3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal
168 injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee; and, if none, then to his personal representative, for the benefit of the estate of the deceased.

3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee

may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact, and shall at all times, regardless of the state of the evidence relating thereto, be left to the
169 jury, as provided in section 5 of article XVIII of the state constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

3160. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any employer to exempt himself or itself from any liability created by this chapter, shall to that extent be void; provided, that in any action brought against such employer under or by virtue of any of the provisions of this chapter, such employer may set off therein any sum it has contributed or paid to any insurance, relief, benefit or indemnity, or that it may have paid to the injured employee or his person- representatives on account of the injury or death for which said action was brought.

170 3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

3162. No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.

171 If you find in this case that the plaintiff is entitled to recover damages from the defendant, then in arriving at the amount of damages the plaintiff is entitled to recover you should take into consideration the age and condition in life of the plaintiff, the physical injury inflicted, the bodily pain and mental anguish endured, and in considering such pain and anguish, you are not limited to actual pain and suffering endured by plaintiff before trial, but you may consider such future suffering as must necessarily result from the injury complained of. And in further arriving at the amount of damages plaintiff is entitled to recover, you should consider plaintiff's ability or inability to work or earn a living since receiving the injury, and the diminution of plaintiff's earning power from what it was prior to the injury complained of, if any such there be, taking into consideration his earning power at the time of the accident, his age and condition of life. In other words if you find from the evidence in this case that the plaintiff has been

172 permanently injured and that the defendant is liable in damages to the plaintiff for such injury, then the plaintiff is entitled to recover for permanent loss of earning power, which includes loss he has already sustained, and which he is likely to sustain during the remainder of his life on account of said injury, but also if you find that the plaintiff can fully or partly recover by ordinary care or attention, you must take that fact into consideration.

If you find in this case that the plaintiff is entitled to damages from the defendant, the amount of damages which you may give may be any amount within the pleadings, depending upon the view you take of the evidence in the case, as governed by the instructions given you.

You are instructed if, under all the facts in the case, and the law as given you in the instructions of the court, you come to the conclusion that the plaintiff is entitled to recover some amount as damages for the injuries which he claims to have sustained, you must not render what is known as a quotient verdict—that is, you must not add together the sums which you severally may believe the plaintiff is entitled to and divide by twelve, or any other number, for the reason that this method of arriving at the amount to be allowed as damages would be unlawful, and the court would be compelled to set aside your verdict.

You are instructed that if you find that the injury to the plaintiff was caused by his own negligence, then you must find a verdict for the defendant.

173 You are instructed that you must take into consideration the negligence of the plaintiff, if any, in this case, and if you find that the plaintiff was negligent in the handling or dumping of the ore car at the time and place of injury in this case. That is to say, if you find that in the handling or dumping of the ore car you find that the plaintiff failed to observe the ordinary care and prudence that an ordinary man familiar with the handling or dumping of such cars would have observed under like circumstances, and that such failure on the part of the plaintiff to observe such ordinary care contributed to the injury received by the plaintiff, then you are instructed that in proportion, as you find the negligence of the plaintiff has contributed to his injury, you will reduce the amount of damages to which the plaintiff would otherwise be entitled. That is to say, if you should find that the injury to the plaintiff was caused half by a condition or conditions of the employment of the plaintiff, and half by the negligent conduct of the plaintiff, then you should reduce one-half the amount of damage you find the plaintiff has suffered from the injury.

You are instructed that unless you believe from the evidence that the injury for which the plaintiff is seeking to recover damages in this case was due to a condition or conditions of the employment of the plaintiff by the defendant, then you must find for the defendant.

The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim.

174 What we mean by the preponderance of evidence is this. Preponderance refers to something that may be weighed. Of course, we cannot get a pair of scales and by some arbitrary method put on one side, the testimony of the plaintiff, and on the other side the testimony of the defendant, and say which one outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfied you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant, he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant; that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant.

When the court says that the plaintiff must satisfy you throughout the entire case of the correctness of his story, that does not necessarily mean that he must satisfy you of the correctness of his story in every minute detail, but must satisfy you in all the material allegations of the correctness of his side of the case.

You, as the jury, are the sole judges of the evidence in the case and of the credibility of the witnesses. It is for you alone to determine the weight to be given to the evidence, and its effect and sufficiency to establish any fact in support of which it has been offered.

175 In so determining you may take into consideration the character of the witnesses their ap-earance and their deportment upon the stand; the extent of their knowledge of the facts in regard to which they testify; the manner in which they or any of them may be affected by the verdict you may render; the reasonableness and consistency of their statements, and from these reasons and any others that may have appeared to you upon the case as it has been presented to you, you may judge and determine as to their credibility and the weight, effect and sufficiency of their testimony.

If you believe that any witness has willfully sworn falsely to any material fact in the case, you are at liberty to disregard the entire testimony of such witness except in so far as it has been corroborated by other creditable testimony, or supported by other evidence in the case.

Under the law of this state, if nine or more of your number agree upon a verdict, you may return the same into open court, but should you return a verdict that was not unanimous those of your number who agree on the same should sign their names thereto.

Should your verdict be unanimous, it is only necessary that it be signed by your foreman and returned into open court.

You will be furnished with blank forms of verdict, and when you have reached a conclusion, after considering all the evidence in the case and the instructions of the court, have that form of verdict which meets with your approval signed in the manner above described, and returned into open court.

176 (Title of Court and Cause.)

Verdict.

We, the Jury, duly empanelled and sworn in the above entitled action, upon our oaths do find: for the plaintiff in the sum of $8,000.00, Eight Thousand Dollars.

F. B. STEELE, *Foreman.*

Filed February 17, 1916.

177 (Title of Court and Cause.)

Judgment.

This cause came on regularly for trial on the fifteenth day of February, 1916. Fred Sutter and J. T. Kingsbury appeared as counsel for plaintiff; and Knapp & d'Autremont and H. E. Pickett appeared as counsel for defendant. A jury of twelve persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the Court, the jury retired to consider their verdict, and subsequently returned into Court, with the verdict signed by the foreman, and, being called, answered to their names; and the foreman delivered to the Court the verdict so signed, which said verdict the Court received, and caused to be read and recorded, and which said verdict was in words and figures as follows, to-wit:

"In the Superior Court, County of Cochise, State of Arizona.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Plaintiff,

vs.

SUPERIOR & PITTSBURG COPPER COMPANY, Defendant.

Verdict.

178 We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths do find: for the plaintiff in the sum of $8,000, Eight Thousand Dollars.

F. B. STEELE, *Foreman.*

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that said plaintiff have and recover from said defendant the sum of Eight Thousand Dollars ($8,000.00), lawful money of the United States, with legal interest thereon from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action, amounting to

the sum of One Hundred Six and Twenty-Five-One-Hundredths Dollars ($106.25).

Done in open Court this 29 day of Feby., 1916.

ALFRED C. LOCKWOOD, *Judge.*

Filed Feb. 29, 1916.

(Title of Court and Cause.)

Notice for Motion for New Trial.

To Hon. Fred Sutter and Hon. J. T. Kingsbury, attorneys for the plaintiff above named in the above entitled cause:

You will please take notice that the defendant above named, upon the annexed papers and the proceedings now on file in said cause, will move the Court, at the County Courthouse, Tombstone, Arizona, on the 9th day of March, 1916, at 10 o'clock in the forenoon, or as
179 soon thereafter as counsel can be heard, to vacate and set aside the verdict and judgment in the above entitled cause, and to grant a new trial in said cause.

KNAPP & D'AUTREMONT,
H. E. PICKETT,
Attorneys for Defendant.

Service of this Notice of Motion for new Trial, and of the annexed Motion for New Trial, is hereby acknowledged, this the 6th day of March, 1916.

FRED SUTTER,
J. T. KINGSBURY,
Attorneys for Plaintiff.
W. J. R.

Filed March 6, 1916.

(Title of Court and Cause.)

Motion for New Trial.

No. 1007.

Comes now the defendant in the above entitled cause and moves the Court to vacate and set aside the verdict and judgment in this cause rendered, and grant it a new trial upon the following grounds, to-wit.

1.

Because the Court erred in overruling the demurrer of the defendant to the complaint of plaintiff herein, for the following reasons:

First. Because said complaint of plaintiff showed that plaintiff sought to recover judgment against defendant under and by virtue

of Chapter Six, of Title XIV, Revised Statutes of Arizona,
180 1913, known as the "Employers' Liability Law" and Section 7 of Article XVIII of the Constitution of the State of Arizona are both unconstitutional and void, in that said provisions are contrary to, and contravene, the Fourteenth Amendment to the Constitution of the United States, in that said provisions deprive the defendant of its property without due process of law and deny to it the equal protection of the laws by subjecting it to unlimited liability for damage for personal injuries suffered by its employes without any fault or negligence on the part of the defendant causing such injuries, or contributing thereto, and that therefore, the complaint of plaintiff failed to state facts sufficient to constitute a cause of action against this defendant.

Second. Because it appeared upon the face of plaintiff's complaint, that plaintiff sought to recover judgment against the defendant under and by virtue of the provisions of Chapter Six, of Title XIV of the Civil Code, Revised Statutes of Arizona 1913, known as the "Employers' Liability Law," and that said "Employers' Liability Law" violates, and is in contravention of, the Constitution of the State of Arizona, and particularly of Sections 5 and 7 of Article XVIII thereof in that said "Employers' Liability Law" attempts to give plaintiff the right to recover damages of defendant in this action, notwithstanding the injuries for which said damages are claimed were contributed to and in part caused by plaintiff's own negligence, and that, therefore, said complaint of plaintiff did not state facts sufficient to constitute a cause of action against the defendant.

181 2.

Because the Court erred in denying and overruling the motion made by defendant at the close of the evidence introduced by the plaintiff, and at the close of the plaintiff's case, when the plaintiff had rested his case, to instruct the jury to find its verdict herein for and in favor of the defendant;

3.

Because of errors of law occurring at the trial of this cause, and during the progress of this cause;

4.

Because the verdict is not justified by the evidence, and the judgment is not justified by the evidence;

5.

Because the evidence is insufficient to support the verdict, and the evidence is insufficient to support the judgment;

6.

Because the evidence is insufficient to sustain the findings of fact;

7.

Because the verdict and the judgment are contrary to law;

8.

Because the verdict is contrary to law;

9.

Because the judgment is contrary to law;

10.

Because the Court erred in admitting and rejecting evidence;

182

11.

Because the Court erred in admitting evidence over the objection of the defendant;

12.

Because the Court erred in rejecting evidence offered by the defendant;

13.

Because the Court erred in charging the jury and in refusing instructions asked;

14.

Because the Court erred in giving instructions asked and requested by the plaintiff;

15.

Because the damages are excessive, given and appearing to have been given under the influence of passion and prejudice;

16.

Because the damages are excessive, given and appearing to have been given under the influence of prejudice;

17.

Because the damages are excessive, given and appearing to have been given under the influence of passion;

18.

Because of the irregularity and irregularities in the proceedings of the jury, in this, to-wit, particularly, in the jury and the member-thereof, during the progress of the trial in this cause, personally examining and handling the person of the plaintiff and his
183 alleged injured part or parts thereof, which tended to and did work prejudice to the defendant and its cause, whereby it was deprived of a fair trial;

19.

Because of misconduct of the jury, and particularly in this, to-wit, that the verdict was arrived at by chance, and lot, and average, and is what is known as a "quotient verdict";

Wherefore, defendant prays the Court to vacate and set aside the verdict and judgment in this cause rendered, and grant it a new trial.

KNAPP & D'AUTREMONT,
H. E. PICKETT,
Attorneys for Defendant.

Filed March 6, 1916.

(Title of Court and Cause.)

Affidavit in Support of Motion for New Trial.

STATE OF ARIZONA,
County of Cochise, ss:

H. H. d'Autremont, being first duly sworn according to law upon his oath deposes and says:

That he is one of the attorneys for the defendant in the above entitled cause, and was present at and conducted the trial on behalf of the said defendant, at the trial of said cause in the above entitled Court, and is better informed of the matters and things herein contained than the defendant, or any of its servants, agents or employes, and makes this affidavit on behalf of said defendant in support of its Motion for New Trial, and particularly in support of the
184 ground or grounds, and matters and things set out and alleged in Paragraph No. 18 in said motion contained and heretofore and herein filed;

That during the progress of said trial, and upon and during the examination of the plaintiff Frank Tomich, who in said trial offered himself as a witness in his own behalf, the said plaintiff was called upon to exhibit himself, and offer his person, and the alleged injured parts thereof, for inspection and physical examination by and at the hands of the jury, and the several members thereof, and was so called by his attorneys; that the plaintiff presented himself to the

jury, who handled his alleged injured members, to-wit, his fingers, and that the plaintiff during this examination, constantly gave expression to exclamations of pain and suffering, and made various signs and indications of great suffering, repeatedly wincing, and drawing away as if in great pain and suffering throughout, endeavoring to demonstrate the fact that he was suffering great and intense pain in his alleged injured fingers, which tended to, and affiant is informed and believes that the same did, greatly impress the jury, and work great prejudice to the defendant;

That further, in the course of said trial, one Dr. Hawley was offered as a witness by the plaintiff, for the purpose of proving the nature of the alleged injury for which the plaintiff sought to recover, and in the course of his examination on behalf of plaintiff, the attorneys for the plaintiff again presented the plaintiff to the jury, and proposed to show and did so show to the jury, using the person of the plaintiff to illustrate and explain the testimony of said
185 witness Hawley, the nature of the alleged injury, and the condition thereof, as found by the said witness Hawley, during a course of treatment and examinations given and made of the plaintiff by said Hawley, prior to the trial, and thereupon, said witness Hawley, exhibited the plaintiff and his alleged injured parts to the jury, and did examine the same and press upon the same, whereupon plaintiff again gave expression to exclamations of pain and suffering, and winced and gave other indications of great suffering all of which tended to and did greatly impress the jury and appeal to the passions of the jury improperly and did so affiant is informed and believes, work great prejudice to the defendant;

That further, in the course of said trial one Dr. Hughart was called as a witness on behalf of plaintiff for the purpose of proving the nature of the alleged injury for which plaintiff sought to recover, and in the course of his said testimony, the attorneys for the plaintiff again offered to exhibit the person of the plaintiff and his alleged injured parts to the jury, to illustrate the testimony of said witness Hughart, and to show the nature of the said alleged injury and thereupon was again allowed to exhibit himself to the jury and the jury and the members thereof, and the said witness Hughart were permitted, over the objection of defendant, the plaintiff was again allowed to exhibit himself to the jury and the jury and the members thereof, and the said witness Hughart were permitted, over the objection of defendant, did proceed to handle the said alleged injured parts of plaintiff, and to make physical examination of the same, during which procedure, with the members of the jury taking
186 part as aforesaid, said witness Hughart rubbed and passed his hands over in contact with the points of alleged injury, at the same time stating to the jury in effect, and substantially as follows, "see how it hurts him" and to the plaintiff, "I am not going to hurt you", and many other similar remarks addressed to the plaintiff or to the members of the jury; that during the said course of action as aforesaid, the plaintiff repeatedly gave expression to many exclamations of great pain and suffering and violently winced and

gave many other indications of great pain and suffering, such as audibly drawing his breath, etc.

That all of the foregoing matters and things were highly improper, and irregular, and tended to and did, so affiant is informed and believes, appeal to the prejudices and passions of the jury and the members thereof, and so inflamed their minds and aroused their passions and appealed to their prejudice, as to prevent them from impartially or fairly considering the evidence adduced at the trial, to the great prejudice of the defendant, whereby defendant was deprived of a fair and impartial trial, which is particularly evidenced and indicated by the highly excessive verdict returned in this case, in which the aforesaid prejudice and passion is an obvious element.

HUBERT H. D'AUTREMONT.

Subscribed and sworn to before me this 25th day of March, A. D. 1916.

[SEAL.] A. C. KARGER,
Notary Public.

187 My commission expires Jan. 2, 1918.

Filed March 25, 1916.

Service of copy of within affidavit admitted and hereby acknowledged, this the 25th day of March, 1916.

J. T. KINGSBURY,
Attorney for Plaintiff.

(Title of Court and Cause.)

Affidavit in Support of Motion for New Trial.

STATE OF ARIZONA,
County of Cochise, ss:

H. E. Pickett, being first duly sworn according to law upon his oath, deposes and says:

That he is one of the attorneys for the defendant in the above entitled cause, and was present at, and assisted at, the trial on behalf of the said defendant, at the trial of said cause in the above entitled Court, and is better informed of the matters and things herein contained than the defendant, or any of its servants, agents or employes, and makes this affidavit on behalf of said defendant, in support of its Motion for New Trial, and particularly in support of the ground or grounds, and matters and things set out and alleged in Paragraph No. 18 in said Motion contained and heretofore and herein filed;

That during the progress of said trial, and upon and during the examination of the plaintiff, Frank Tomich, who in said trial offered himself as a witness in his own behalf, the said plaintiff was
188 called upon to exhibit himself, and offer his person, and the alleged injured parts thereof, for inspection and physical ex-

amination by and at the hands of the jury, and the several members thereof, and was so called by his attorneys; that the plaintiff presented himself to the jury, who handled his alleged injured members, to-wit: his fingers, and that the plaintiff during this examination, constantly gave expression to exclamations of pain and suffering, and made various signs and indications of great suffering, repeatedly wincing and drawing away as if in great pain and suffering, through endeavoring to demonstrate the fact that he was suffering great and intense pain in his alleged injured fingers, which tended to, and affiant is informed and believes that the same did, greatly impress the jury and work great prejudice to the defendant.

That further, in the course of said trial, one Dr. Hawley, was offered as a witness by the plaintiff, for the purpose of proving the nature of the alleged injury for which the plaintiff sought to recover, and in the course of his examination on behalf of plaintiff, the attorneys for the plaintiff again presented the plaintiff to the jury, and proposed to show and did so show to the jury, using the person of the plaintiff to illustrate and explain the testimony of said witness Hawley, the nature of the alleged injury, and the condition thereof, as found by the said witness Hawley, during a course of treatment and examinations given and made of the plaintiff by said Hawley, prior to the trial, and thereupon, said witness Hawley, exhibited the plaintiff and his alleged injured parts
189 to the jury, and did examine the same and press upon the same, whereupon again the plaintiff gave expression to exclamations of pain and suffering, and winced and gave other indications of great suffering, all of which tended to and did greatly impress the jury and appeal to the passions of the jury improperly and did, so affiant is informed and believes, work great prejudice to the defendant;

That further, in the course of said trial one Dr. Hughart was called as a witness on behalf of the plaintiff for the purpose of proving the nature of the alleged injury for which plaintiff sought to recover, and in the course of his said testimony, the attorneys for the plaintiff again offered to exhibit the person of the plaintiff and his alleged injured parts to the jury, to illustrate the testimony of said witness Hughart, and to show the nature of the said alleged injury and whereupon, over the objection of defendant, the plaintiff was again allowed to exhibit himself to the jury and the jury and the members thereof, and the said witness Hughart were permitted, over the objection of the defendant, did proceed to handle the said alleged injured parts of plaintiff, and to make physical examination of the same, during which procedure, with the members of the jury taking part as aforesaid, said witness Hughart rubbed or passed his hands over in contact with the points of alleged injury, at the same time stating to the jury in effect and substantially as follows "see how it hurts him" and to the plaintiff "I am not going to hurt you," and many other similar remarks addressed to the plaintiff or to the members of the jury; that during the said course of action as aforesaid, the plaintiff repeatedly gave

190 expression to many exclamations of great pain and suffering and violently winced and gave many other indications of great pain and suffering, such as audibly drawing his breath, etc.

That all of the foregoing matters and things were highly improper, and irregular, and tended to and did, so affiant is informed and believes, appeal to the prejudice and passions of the jury and the members thereof, and so inflamed their minds and aroused their passions and appealed to their prejudice, as to prevent them from impartially or fairly considering the evidence adduced at the trial, to the great prejudice of the defendant, whereby defendant was deprived of a fair and impartial trial, which is particularly evidenced and indicated by the highly excessive verdict returned in this case, in which the aforesaid prejudice and passion is an obvious element.

H. E. PICKETT.

Subscribed and sworn to before me this 25th day of March, A. D. 1916.

[SEAL.] A. C. KARGER,
Notary Public.

My commission expires Jan. 2, 1918.

Filed March 25, 1916.

Service of copy of within affidavit admitted and hereby acknowledged this, the 25th day of March, 1916.

J. T. KINGSBURY,
Attorney for Plaintiff.

191 (Title of Court and Cause.)

Present: Hon. Alfred C. Lockwood, Judge, John F. Ross, County Attorney, Harry C. Wheeler, Sheriff, John W. Walker, Reporter, and J. E. James, Clerk.

Certified Minutes of Trial Court.

Minute Entry of March 27, 1916. Book 21, Page 534.

This cause coming before the Court at this time for hearing on Law Points, Plaintiff present by counsel Fred Sutter, Esq., and Defendant present by counsel Cleon T. Knapp, Esq. It appearing that the time for entering an appearance by the defendant herein has expired and defendant not having entered an appearance at this time, upon agreement of counsel for plaintiff and by leave of Court, counsel Cleon T. Knapp, Esqr., does now in Open Court enter the Appearance of the defendant herein, and thereafter the Motion of the Defendant to Compel Plaintiff to Elect as to which of the two causes of action set forth in the Complaint of Plaintiff,

be relied upon, was argued and submitted to the Court for decision. The Court considered the premises, denied the motion and permitted Counsel for Defendant two weeks in which to file such amended pleadings as he may deem necessary. Counsel for the Defendant excepted to the ruling of the Court on said Motion. On motion of counsel for the Plaintiff it is by the Court ordered that the Second cause of action set forth in the complaint, be dismissed.

Minute Entry of April 17, 1915. Book 21, Page 578.

It is by the Court ordered that May 22, 1915, be and the same is hereby set as the date for the hearing on law points herein.

192 Minute Entry as of May 22, 1915. Book 22, Page 39.

On agreement of counsel hereto, it is by the Court ordered that the hearing on law points herein be and the same is hereby continued for further setting.

Minute Entry as of July 6, 1915. Book 22, Page 82.

It is by the Court ordered that July 17, 1915, be and the same is hereby set as the date for hearing on law points herein.

Minute Entry as of July 17, 1915. Book 22, Page 116.

This cause came on regularly at this time for hearing on law points. Plaintiff present by counsel Fred Sutter, Esq., and Defendant present by counsel Cleon T. Knapp, Esq. Counsel for Defendant submitted motion to Strike portions of Complaint and elect and Demurrers thereto without argument. The Court considered the premises and denied the motion and overruled the demurrers.

It is by the Court ordered that August 23, 1915, be and the same is hereby set as the date for the trial of this cause.

193 Minute Entry as of August 18, 1915. Book 22, Page 191.

On motion of the plaintiff it is by the Court ordered that the trial of this cause be continued for the term.

Minute Entry as of January 15, 1916. Book 22, Page 465.

It is ordered that February 11, 1916, be set as the date for the trial on Plea in Abatement and on Merits of this cause, but by separate juries.

On motion of counsel for Defendant it is ordered that there be struck from the complaint herein that portion of Paragraph VII of the First Cause of Action, and Paragraph VIII of Plaintiff's Second Cause of Action alleging that Plaintiff was at the time of

said injury and is now a married man with three minor children to support.

Minute Entry as of February 5, 1916. Book 22, Page 519.

This cause came on for hearing on law points this date, Messrs. Fred Sutter and W. B. Cleary, Esquires, appearing for the Plaintiff and H. de Autremont, Esq., appearing for the Defendant. On motion of Fred Sutter, Esq., it is ordered that J. T. Kingsbury, Esq., be entered herein as of counsel for the Plaintiff and on motion of H. de Autremont, Esq., it is ordered that H. E. Pickett, Esq., be entered as of counsel for the Defendant. Counsel then argued and submitted the General Demurrer of Plaintiff to Plea in Abatement of Defendant.

194 The Court considered the premises and sustained the General Demurrer and counsel for Defendant advised the Court that he would amend his pleadings.

Minute Entry as of February 15, 1916. Book 22, Page 537.

This cause came on regularly for trial this date, Plaintiff present in person and by his attorneys, Messrs. Sutter and Kingsbury, and the Defendant appeared by its counsel, Messrs. d'Autremont and Pickett.

Counsel for Defendant presented and filed their Fourth Amended Answer and submitted without argument, the Demurrers set up therein. The Court considered and overruled same.

Parties then announced ready for trial and upon order of the Court, the Clerk drew from the box the names of Twenty (20) Jurors, administered to them the oath and counsel examined the Panel on their Voir Dire. The Court admonished the Panel and excused them until 1:30 p. m. this date.

Minute Entry as of February 15, 1916. Book 22, Page 538.

This cause came before the Court pursuant to recess with all parties to the action and the Jury Panel present. Counsel waived a roll call and, having exercised their *preemptory* challenges, upon order of the Court, the Clerk called the first twelve names remaining on the Jury List unchallenged, and the following are the persons so called, and who were duly sworn as the Jury to try this cause.

195

W. C. Crawford,	E. F. Kellum,	Ed Ikler,
Richard Edwards,	Hal Smith,	Randolph Reuser,
E. Sylvester,	L. H. Maddux,	F. B. Steele,
R. E. Warner,	T. C. Coliins,	Joe T. Goodman.

The jurors not engaged in the trial of this cause were excused by the Court until February 17, 1916, at 9:00 a. m. Mike Francovich

was sworn as interpreter. The witnesses were called, sworn, admonished and excluded from the Court room and the trial proceeded.

Come now the Plaintiff and called as witnesses Frank Tomich, and Katie Tomich, who testified and the Jury was admonished by the Court and excused until 9:00 a. m., February 16, 1916.

Minute Entry as of February 16, 1916. Book 22, Page 540.

The trial herein resumed this date with all parties present. The Jury returned into Court; counsel waived a roll call and the Plaintiff called as witnesses: Ed. Massey, C. F. Hawley, H. H. Hughart, who were all duly examined and cross examined, and the Plaintiff rested his case in chief.

Counsel for the Defendant presented and filed and submit-ed wi-hout argument a motion to direct a verdict for the Defendant. The Court considered the premises and denied the motion.

The Defendant then called as witnesses: Wm. McDonald, Thomas Murphy, and Garfield Angov, who were all examined and cross examined and the Defendant rested its case in Chief.

196 Counsel advised the Court that there would be no Rebuttal testimony and the evidence was declared closed.

The Jury was admonished by the Court and excused until 1:30 p. m. this date and recess was ordered until said hour.

Court re-convened pursuant to recess at 1:30 p. m. with all present.

Minute Entry as of February 16, 1916. Book 22, Page 541.

This cause came before the Court pursuant to recess with all parties to the action present and the Jury in the box. Counsel waived a roll call. The Court instructed the Jury. Counsel argued and submitted the cause. Bailiffs James McHugh and Miles Merrill were duly sworn and the Jury retired in their charge to deliberate as to their verdict.

Verdict.

Minute Entry as of February 17, 1916. Book 22, Page 542.

The Jury returned into Open Court in charge of their Bailiffs, all present. Counsel waived a roll call and upon inquiry from the Court the Jury answered through their Foreman that they had agreed upon a verdict and the same was presented to the Court and the following is the verdict so rendered and which was recorded by the Clerk; after stating title of Court and cause:

We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the Plaintiff in the sum
197 of $8,000.00, Eight Thousand Dollars.

F. B. STEELE, *Foreman.*

The Jury was excused by the Court from further consideration of this cause. J. T. Kingsbury, Esq., of counsel for the Plaintiff herein moved the Court for judgment on the Verdict as rendered. The Court considered the Motion and ordered that upon the presentation of a formal writ-en judgment in this action by the Plaintiff, and its approval and signing by the Court, judgment will be rendered in favor of the Plaintiff in accordance with the verdict rendered herein.

Minute Entry as of February 24, 1916. Book 22, Page 557.

It is by the Court ordered that the hearing on the Motion for a New Trial herein, be continued until March 4, 1916.

Minute Entry as of February 26, 1916. Book 22, Page 559.

This cause came before the Court at this time for hearing on the Motion to Set Aside the Verdict and Judgment herein and for a New Trial.

Plaintiff present by J. T. Kingsbury, Esq., his counsel and Defendant present by counsel Messrs. d'Autremont and H. E. Pickett. Counsel argued and submitted the Motion to the Court for decision. The Court considered the premises and denied the Motions, to which ruling of the Court counsel for the Defendant excepted.

198 Minute Entry as of February 29, 1916. Book 22, Page 569.

In this cause, the Court having fixed the Jury fee at the sum of $72.00, and a formal, written judgment in this action having been this day presented to and approved by the Court, in accordance with the order heretofore made, it is ordered that judgment be rendered herein in favor of the plaintiff and against the Defendant for the sum of Eight Thousand Dollars, to bear interest from date hereof until paid at the legal rate of interest and for $106.25 costs.

Minute Entry of March 9, 1916. Book 22, Page 591.

On motion of H. E. Pickett, Esq., counsel for Defendant herein, it is ordered that March 18, 1916, be set as the date of hearing on Motion for a New Trial.

Minute Entry of March 18, 1916. Book 23, Page 12.

It is by the Court ordered that the hearing on law points herein be and the same is continued until March 25, 1916.

Minute Entry as of March 25, 1916. Book 23, Page 35.

This cause came before the Court at this time for decision of the Court on the Motion of the Defendant for a new trial herein. The Court having considered the said Motion, does now overrule same.

ALFRED C. LOCKWOOD, *Judge.*

199 STATE OF ARIZONA,
County of Cochise, ss:

I hereby certify the annexed and foregoing to be a full, true and correct copy of the Minutes (and Supersedeas Bond on Appeal) in the cause entitled Frank Tomich, Plaintiff. vs. Superior and Pittsburg Copper Company, a corporation, Reg. No. 1007 on file in the Clerk's office of the Superior Court, State of Arizona in and for the County of Cochise.

Witness my hand and Seal of said Court this 15th day of July, 1916.

[SEAL.]

J. E. JAMES,
Clerk of the Superior Court,
By H. P. JOHNSON,
Deputy Clerk.

(Title of Court and Cause.)

Notice of Appeal.

To Frank Tomich, sometimes known as Frank Thomas, the plaintiff in the above entitled cause, and to Messrs. Fred Sutter and J. T. Kingsbury, attorneys for the said plaintiff in the above entitled cause:

Please take notice, that the Defendant in the above entitled cause, the Superior & Pittsburg Copper Company, a Corporation,
200 hereby appeals to the Supreme Court of the State of Arizona, from the verdict and the judgment rendered thereon in the above styled Court in the above entitled cause upon the 29 day of February, 1916, in favor of the above named Plaintiff and against the said above named Defendant, and from the whole thereof:

And you will please take notice, that the said Defendant the Superior & Pittsburg Copper Company, a corporation, hereby appeals to the Supreme Court of the State of Arizona, from that certain order made and entered in the above entitled cause in said Court above styled, on the 25th day of March, 1916, denying and overruling the Motion of the said Defendant to vacate and set aside the
201 verdict and judgment in said cause and to grant it a New Trial.

KNAPP & D'AUTREMONT,
H. E. PICKETT,
Attorneys for the Defendant, The Superior & Pittsburg Copper Co., a Corporation.

Filed March 29, 1916.

(Title of Court and Cause.)

Affidavit of Service.

STATE OF ARIZONA,
County of Cochise, ss:

H. E. Pickett, being first duly sworn according to law upon his oath says, that he is one of the attorneys for the above named Defendant; that on the 29th day of March, 1916, he served upon the plaintiff in the above entitled cause the Notice of Appeal in this cause filed, as required by law, in the following manner, to-wit, by delivering a copy thereof to J. T. Kingsbury, Esq., one of the attorneys for the above named plaintiff.

H. E. PICKETT.

Subscribed and sworn to before me this the 10th day of June, 1916.

[SEAL.] JAS. P. BOYLE,
Notary Public, Cochise County, Arizona.

202 My commission expires September 1, 1919.

Filed: June 13, 1916.

(Title of Court and Cause.)

Supersedeas Bond on Appeal.

Know all men by these presents: That we, the Superior and Pittsburg Copper Company, a Corporation, the defendant in the above entitled cause, as Principal, and J. E. Curry of Warren, Arizona, and M. J. Brophy, of Bisbee, Arizona, as Sureties are held and firmly bound unto Frank Tomich, sometimes known as Frank Thomas, the Plaintiff in the above entitled cause, in the sum of Seventeen Thousand and no-100 Dollars ($17,000.00), lawful money of the United States of America, for the payment thereof, well and truly to be made, we bind ourselves, all and each of our successors, heirs, and legal representatives, jointly and severally, firmly by these presents, signed with our hands and sealed with our seals, this 31st day of March, 1916.

The condition of the above undertaking is such that, whereas, in the Superior Court of the County of Cochise, State of Arizona, on the 29th day of February, 1916, said Court rendered judgment against said above named Defendant and in favor of said above named Plaintiff in and for the sum of Eight Thousand Dollars ($8,000.00) together with interest thereon at the legal rate thereof per annum from date of said judgment until paid, and for costs of suit taxed at
203 the sum of $106.25, all in the above entitled cause, and that said judgment in said cause was filed for record on the said 29th day of February, 1916; and that in said cause the said Court on

the 25th day of March, 1916, made and entered its order denying the motion of the defendant to vacate and set aside the verdict and judgment in said cause and to grant it a New Trial;

And whereas, the said Defendant, The Superior and Pittsburg Copper Company, a Corporation, is desirous of appealing to the Supreme Court of the State of Arizona from said verdict and judgment, and from said order denying its said Motion to vacate and set aside said verdict and judgment and to grant it a New Trial, and having given its Notice of Appeal therefrom, all and singular, to said Supreme Court, according to the law in such cases made and provided;

Now Therefore, if the said Defendant, the Superior and Pittsburg Copper Company, a corporation, will prosecute its said appeal with effect, and in case the judgment of the said Supreme Court shall be against it, that it will perform its judgment sentence or decree, and pay all such damage and costs as may be awarded against it on appeal, then this obligation to be null and void, otherwise to be and remain in full force, virtue and effect.

THE SUPERIOR AND PITTSBURG COPPER COMPANY, A CORPORATION, [SEAL.]
By JOHN C. GREENWAY,
Its General Manager.
J. E. CURRY, [SEAL.]
M. J. BROPHY. [SEAL.]

204 STATE OF ARIZONA,
County of Cochise, ss:

J. E. Curry and M. J. Brophy, the sureties in the foregoing undertaking, being duly sworn according to law, each for himself and not the one for the other, says, that he is worth the sum of Seventeen Thousand Dollars ($17,000.00) over and above all his just debts and liabilities, exclusive of property exempt from execution and that he is a resident freeholder within said County of Cochise, State of Arizona.

M. J. BROPHY.
J. E. CURRY.

Subscribed and sworn to before me, this the 31 day of March, 1916.
[SEAL.] H. W. WILLIAMS,
Notary Public, Cochise County, Arizona.

My Commission expires Feb. 19, 1920.

Filed: April 4, 1916.

Approved: April 4, 1916.

Service of the within Supersedeas Bond on Appeal is hereby admitted this 3rd day of April, 1916.

FRED SUTTER,
By W. J. R.,
Attorney for the Plaintiff.

205 In the Supreme Court of the State of Arizona.

No. 1535.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Appellant,

vs.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Appellee.

Be It Remembered, that on, towit, the 8th day of January, 1917, the same being one of the regular juridical days of the said Supreme Court, the following Order was had and entered of record in the said cause, which said Order is in the following words and figures as follows, to-wit:

At this day, It Is Ordered, that the above cause be and the same is hereby set for oral argument on Friday, January 19th.

206 And afterwards and upon, towit, the 19th day of January, 1917, the same being one of the regular juridical days of the said Supreme Court, the following Order was had and entered of record in the said cause in words and figures as follows, towit:

This cause coming on for hearing at this time was argued for appellant by Mr. Herbert d'Autremont, and for appellee by Judge Fred Sutter; and ordered submitted.

207 In the Supreme Court of the State of Arizona.

No. 1535.

SUPERIOR AND PITTSBURG COPPER COMPANY, a Corporation, Appellant,

vs.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Appellee.

Appeal from a Judgment of the Superior Court of Cochise County, Alfred C. Lockwood, Judge. Affirmed.

Opinion.

The appellee was employed by the appellant in underground workings of its mines in Cochise County. The appellee's duties required him to load, push on a track, and unload ore cars. The place for the performance of such duties was on the nine hundred foot level of the mine. The track was laid through a drift from the point of loading the cars to a point of unloading the ores into a chute. The appellee was an experienced car man accustomed to such work in other mines. When the car had received its load of about two thousand pounds weight, the appellee was required to start the car moving

on the track, and control its movements until the chute was reached.
Timbers were so placed about the chute as to facilitate the un-
208 loading or dumping of the load. On November 9th, 1914,
and a few hours after appellee had first commenced his labors in the said drift, he started a loaded car from the point of loading along the track toward the chute, and following the car with his right hand holding the top of the rear end of the car as it moved over the track by gravity, appellee stumbled over something on the floor or slipped on the track or on the ground and was thrown to the ground but continued to hold to the rear end of the ore car as it moved toward the chute. So holding to the car, the car struck the obstructions about the chute with such force that the fastenings on the doors of the car released and the car ended over so that three fingers on appellee's right hand were caught between the rear end of the car which he was holding and a cross timber about the chute. The fingers were lacerated, crushed and bruised so that they were amputated about the first joints of each finger. The said surgical operation was done at the appellant's hospital department, and when the
wounds healed the nerves were left so exposed as to be sensi-
209 tive and tender and causing suffering, and a further amputation of the fingers is required to relieve such condition. The appellee commenced this action to recover damages for his said injuries basing his cause of action on the Employers' Liability Law, Chapter VI of Title 14 of the Civil Code of Arizona, 1913, and upon negligence. The cause of action founded upon negligence was expressly waived and abandoned by plaintiff upon the trial. The defendant demurred to the complaint upon the ground that the Employers' Liability Law and the constitutional mandate in obedience to which such statute was enacted are both void because they are contrary to and contravene the Fourteenth Amendment to the Constitution of the United States, in that they deprive the defendant of its property without due process of law, and deny to it the equal protection of the law, by subjecting it to unlimited liability for damages for personal injuries suffered by its employees without any fault or
negligence on its part, and, because such statute attempts to
210 give plaintiff the right to recover damages of defendant notwithstanding the injuries for which such damages are claimed were contributed to and in part caused by plaintiff's own negligence, and attempts to deprive the defendant of the right to wholly defeat this action by interposing the defense of contributory negligence. The defendant alleges that the damages, if any, resulted wholly from plaintiff's neglect and carelessness, and his failure to use any care or caution in his own behalf at the time and place of the alleged injury. The further defense is that the plaintiff contributed to the injury by his own negligence, in that at the time of its occurrence the plaintiff was giving no attention or insufficient attention to his duties, and failed to push the car in the proper manner or place his hands on the car in the proper position, and other like failures are alleged.

The court overruled the demurrer and the cause was tried to a

jury. The jury returned a verdict against the defendant for the sum of $8,000.00. Judgment followed the verdict
211 The defendant appeals from the judgment and from an order refusing a new trial.

Messrs. Knapp and D'Autremont, of Bisbee, and Mr. H. E. Pickett, of Douglas, for Appellant.

Mr. Fred Sutter, of Bisbee, and Mr. J. T. Kingsbury, of Tombstone, for Appellee.

CUNNINGHAM, *J.*:

The appellant assigns as error the overruling of its demurrers to the complaint for the reason both Chapter VI of Title 14, Revised Statutes of Arizona, 1913, Civil Code, upon which the action is based, and the constitutional mandate, Section 7 of Article XVIII of the State Constitution, in obedience to which said Chapter VI was enacted, violate Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the Employers' Liability Law, said Chapter VI of Title 14, attempts to deprive the defendant of its property without due process of law by imposing unlimited liability on it as an employer for personal injuries sustained by an employee while in its employ in cases where defendant has been guilty of no fault, want of care, or neglect of duty; and, because the Employers' Liability Law contravenes and is in violation of Sections 5 and
212 7 of Article XVIII of the constitution of the State of Arizona, in that said statute attempts to give plaintiff the right to recover judgment for personal injuries notwithstanding the injuries for which said judgment is sought were contributed to and in part caused by plaintiff's negligence, and attempts to deprive defendant of the right to wholly defeat this action by showing that said injuries were contributed to and in part caused by plaintiff's own negligence.

The questions of the constitutional validity of the Employers' Liability Law are raised in a number of different objections. The defendant assigns as error the admission and rejection of evidence and misconduct of the trial judge during the trial of the cause working a prejudice and resulting in an excessive verdict.

The appellant groups the assignments of error under four divisions covering the points of law raised in the cause.

First. The Employers' Liability Law, Chapter VI of Title 14, under which the action is brought is unconstitutional and void;

Second. That the plaintiff failed to make out a case war-
213 ranting recovery under the Employers' Liability Law;

Third. Error in admitting and excluding evidence and in giving instructions; and,

Fourth. An excessive verdict.

Under the first division the case of Inspiration Consolidated Copper Company v. Mendez, 19 Ariz., —, not yet reported, on the authority of New York C. R. Co. v. White, U. S. Adv. Ops. 1916, page 247, holds to the opinion that the Employers' Liability Law is valid within the police powers of the State and does not come into con-

flict with the Fourteenth Amendment of the Constitution of the United States; and, that such Liability Law is a valid, subsisting enactment and is a law of the State of Arizona.

Appellant contends that Chapter VI of Title 14 is void for the reason its terms conflict with Sections 5 and 7 of Article XVIII of the State Constitution.

Section 5 is that:

"The defense of contributory negligence or of assumption
214 of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

This section does not restrict the power of the legislature to modify or abolish the defense of contributory negligence. The restriction contained in the section is clear that no law shall be enacted which attempts to make the defenses of contributory negligence or assumption of risk, when interposed, determinable by the courts as matters of law, but, such defenses are made to depend upon facts when they are properly interposable, and interposed they are required to be established by a preponderance of the evidence to the satisfaction of the jury. Whether the plaintiff's negligence contributed to the wrong, or whether the plaintiff assumed the risk and danger from which the wrong arose, must be determined as a fact from the evidence by the jury.

Section 7 commands the legislature to enact an employers' liability law, by the terms of which any employer shall be liable for the death or injury of workmen employed in all hazardous occupations
215 named, and any other industry designated by the legislature, whenever such death or injury is caused by any accident due to a condition or conditions of such occupation, except when such death or injury has been caused by the negligence of the employee killed or injured.

The only restriction placed upon the legislative power in carrying *our* said constitutional mandate found in the section of the Constitution is the exception, viz.: liability is incurred "in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured." In all other cases the legislative power is unlimited by said Section 7.

A careful examination of Chapter VI of Title 14 discloses no violation of such limitation on the power of the legislature. The exception is carefully preserved in Paragraph 3154 of the statute. If the injury resulted from an accident arising out of and in the course of labor, service and employment in a hazardous occupation, and was due to a condition or conditions of such occupation or employment, and was not caused by the negligence of the employee the lia-
216 bility to damages exists. If, however, the injury was caused by negligence to which the injured workman contributed, the liability of the employer remains to an amount of the full damages less the amount of damages attributable to the employer's negligence. In other words, the damages are to be apportioned to the parties, employer and employee, as the negligence attributable to the one is to the negligence attributable to the other. Paragraph 3159, Civil Code of Arizona, 1913. "The fact (appearing) that the employee

may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be dimi-shed by the jury in proportion to the amount of negligence attributable to such employee," are the words of the statute. The statute is in full harmony with the constitutional mandate and with its restriction.

The defendant set forth in its answer the contributory negligence of the plaintiff consisting of the manner in which the plaintiff was performing his duties at the time of the accident, but defend-
217 ant's answer does not set forth any claim for a reduction of damages by reason of such negligence, but claims such contributory negligence as a complete, not a partial, defense to the action. The answer is evidently interposed upon the theory of the common-law rule of contributory negligence in bar of the cause of action. Under the provisions of Chapter VI, supra, nothing less than the sole negligence of the employee injured will bar an action based on the statute for damages. Negligence of the employee contributing to the injury may serve to reduce the amount of the recovery but will not bar recovery.

The defendant having in its answer admitted that its negligence in part was the cause of the damages, by setting forth a charge of contributory negligence against the plaintiff authorized a verdict against defendant in any event. The matters left open for inquiry were, the amount of the damages the plaintiff was entitled to recover as measured by the allegations of the complaint and the evidence, and, whether the accident was due to a condition or conditions of
218 the employment and such as is unavoidable.

The appellant complains that the amount of damages found is excessive and out of all proportion to the nature, extent and seriousness of the injury, to the loss of time, wages, or future earning capacity, to the amount necessary to effect a recovery, to his station in life and to his pain and suffering. No complaint is made that the evidence does not sustain the verdict. The specific complaints are made that the jury asked questions of witnesses during the progress of the trial; and the members of the jury were permitted to and did examine the plaintiff's injured hand and touched and pressed his wounded fingers, and the members of the jury were thereby prejudiced, which prejudice resulted in a verdict for excessive damages.

With regard to the first complaint made, the abstract of record discloses that counsel for defendant invited the jury to ask questions of witness Massey. Thereafter the jurors freely asked ques-
219 tions of other witnesses. The record discloses no objection was offered by the defendant to any question asked by any juror of any witness. The practice of allowing attorneys, parties, the judge, and jurors to examine witnesses in a disorderly manner has a tendency to break down the decorum becoming the sanctity of a trial and should be discouraged. The proper dignity of the court required orderly procedure in a trial of the cause to be strictly observed. The liberty or property of litigants is involved in the result of every law suit, and the trial of such rights may result in tragedy to some interested human being. Certainly a tragedy results from error committed, never comedy. The purpose of a lawsuit is to determine the

exact rights of the parties thereto and enforce such exact rights. The wisdom of ages of experience has served to teach our profession that the observance of the prescribed rules of procedure more nearly discover the exact rights of parties than haphazard, disorderly procedure. Not every departure from orderly trial procedure justifies a reviewing court in reversing a judgment because of irregular trial pro-
220 cedure. The irregular procedure must have prejudiced the rights of the party complaining before an appellate court is justified in disturbing a judgment. We must presume that no harm befell the defendant by reason of the many questions asked the witnesses on this trial, for the reason the defendant first invited the asking of the questions, and at no time during the trial objected to that form of procedure.

The appellant contends that the questions asked the witnesses by the jurors conclusively indicate a prejudice against this defendant, inducing an excessive verdict for damages. The nature of the questions called for answers giving information covering a wide field of inquiry, and were not confined to testimony bearing upon the amount of damages. The questions were largely confined to detail matters connected with the knowledge of the witness with regard to which he had testified, the credibility of the witness, and his means of knowledge of the matter with respect to which he gave testimony. The jurors had a very good reason to test the witness' means of knowledge of these matters and the test given indicates no prejudice
221 against defendant. This particular matter was not insisted upon as a ground for a new trial and is first raised on this appeal. For that reason the objection must be overruled. The verdict does not conclusively appear to have been reached through prejudice and bias, nor induced by passion and prejudice.

The appellant contends that by permitting the jurors to examine plaintiff's wounded hand and fingers, and during such examination to squeeze and press his hand for the purpose of discovering the present sensitive condition of the fingers was error and resulted in causing the jury to return a verdict for excessive damages. The appellant nowhere contends that the evidence thus gained by the jury was false. If as a fact the plaintiff's wounds remained sensitive and prevented plaintiff from earning a living, and the jury ascertained that fact from personal physical examinations and by experimenting with the wound, no harm resulted to appellant simply by the
222 use of the means complained of in arriving at the fact. Appellant did not object to the examinations when being made by the jury and cannot now complain of the character of the evidence used to establish the fact.

While the record discloses many departures from the ideal trial of a law suit, these departures were consented to, acquiesced in, submitted to, or indulged, by appellant without objection, and do not appear affirmatively upon the record to have worked a prejudice to appellant's rights. The verdict returned is large in amount, but that matter lay with the jury. No question is made that the verdict is not sustained by substantial evidence.

Upon the whole case I am of the opinion the record contains no reversible error. Consequently the judgment must be affirmed.

(Signed) D. L. CUNNINGHAM, *Judge.*

FRANKLIN, *C. J.* (concurring):

The demonstrations permitted before the jury in this case rather exceeded the limits defined in such matters, but here as in
223 predicating error on allowing the jurors to propound objectionable questions appellant is estopped because a similar demonstration was made at the request of appellant. With regard to the excessiveness of the damages, where there is a personal injury permanent in its character there is much difficulty in measuring compensation for it by strict and definite rules, and, therefore, it must be left largely to the sound judgment of a jury and the trial judge. As a result of this accident the index and second finger of plaintiff's hand were amputated at the first joint and the third finger amputated just a little above the first joint, causing the nerves to be caught in the flesh and healed in the scar tissue causing neuritis and resulting in severe and constant pain to relieve which condition another operation under an anæsthetic would be necessary. The jury found a verdict for eight thousand dollars ($8,000) which was upheld by the trial judge on motion for a new trial. The verdict appears somewhat large, but that it is larger than the appellate court would give or that the appellate court would be better satisfied with a smaller
224 verdict—these are not the criteria by which we are guided in reversing a case and ordering a new trial because of an excessive verdict. This court is restrained from so doing unless our minds are satisfied that from the large amount of the verdict the jury arrived at it because of passion, prejudice, partiality or corruption on their part. In view of the principles which restrain the court in such a matter, and especially having the refusal of the trial court on motion for a new trial to interfere, I do not think this court is authorized or would be justified in reversing the case on that ground. See Ann. Cas. 1913 A, 1362.

Counsel for appellee does not oppose a remitter of some portion of the verdict which this court might deem excessive as a condition of denying a new trial, but I have not considered the power of this court to do so under Section 578, Revised Statutes 1913, or the propriety of its exercise here, because appellant on argument expressly asked the court not to order a remitter if it was not of opinion that
225 a new trial should be granted without such condition. I, therefore, concur in affirming the judgment.

(Signed) ALFRED FRANKLIN,
Chief Justice.

Ross, *J.:* (dissenting):

I dissent. Later I will file my reasons.

(Signed) HENRY D. ROSS, *Judge.*

Endorsement: Filed July 2, 1917. C. F. Leonard, Clerk Supreme Court.

(Dissenting Opinion.)

(Title of Court and Cause.)

Ross, *J.:*

I endeavored to show in my dissenting opinion in Inspiration Consolidated Copper Company v. Mendez, 166 Pac. 278, that the new right of action contemplated by Sec. 7, Art. 18 of the Constitution and for which the legislature was directed to provide, by proper legislation, is not and could not be an action for damages for
226 personal injury according to the standards of the common law. The procedure adopted by the legislature to enforce the right is according to the common law rules and standards of damages in case of tort, but the right of action itself finds no prototype in the common law. It is in its essential features the same right of action upon which compensation for injury is justified by the courts. If the injury be "due to a condition or conditions of the occupation," then it cannot be due to the negligence of either the employer or employee. If it be due to the negligence of the employer, the injured employee or his dependents should pursue the common law remedy for damages in tort or accept compensation under the Workmen's Compensation Act. If it be caused by the negligence of the employee, his only recourse is compensation under the Workmen's Compensation Act.

Recovery was had in the present case upon the theory that although the injury was due to a condition or conditions of
227 the occupation without any fault of either the employer or employee, the damages should be ascertained and measured by the standards of the common law action for negligence following the legislative formula. The error was in applying the old common law remedy to the new right—in dressing this new and up-to-date creature of the law with habiliments two or more centuries old.

If this new right of action arises only in case of an unavoidable accidental injury in which neither the employer nor employee is to blame or at fault, the liability, in order to conform to due process of law and afford equal protection of the law should be ascertained and measured according to the rules adopted by the different systems of compensation law.

New York Central R. Co. v. White, 243 U. S. 188, 61 L. Ed. —, 37 Sup. Ct. 247;

Mt. Timber Co. v. Washington, 243 U. S. 219, 61 L. Ed. —, 37 Sup. Ct. 260;

Hawkins v. Bleakly, 243 U. S. 210, 61 L. Ed. —, 37 Sup. Ct. 255.

The legislature misapprehended its duty and misconceived
228 its powers when it provided that contributory negligence and assumption of risk could be interposed to an action based upon an injury without fault. The constitutional mandate neither in direct terms, nor by implication authorizes these defenses. On

the contrary the very definition of the right of action foreshadowed and intended to be created, excludes them as defenses. The injury to be actionable under this law, must have been "caused by an accident due to a condition or conditions of such occupation," and not by any negligence. Assumed risk is a species of contributory negligence, in that one who takes employment in a dangerous or hazardous occupation whether inherently so or by reason of the employer's negligence, of which he has knowledge, may be said to have contributed to his own injury from the mere fact of working under such conditions.

We have the legislature (and the majority opinion approves it) announcing the paradoxical and strangely absurd rule that if the accident is caused by contributory negligence, that is, negligence of both the employer and the employee, "the damage shall be
229 diminished by the jury in proportion to the amount of negligence atributable to such employee." Whereas, the employer, innccent of wrong, guilty of no fault, for accidents inherent and unavoidable, must pay the whole toll. He must pay more than the one whose negligence contributed to the injury. The legislature and the court unite in awarding some immunity to an employer whose negligence contributes to the injury, and since injuries must occur,—are inevitable,—in order to secure any reduction of the damages, the employer is encouraged to contribute thereto or failing in actually being guilty of negligence, estop himself from denying it by pleading contributory negligence in his answer as in the present case.

The large verdict in this case is only illustrative of what is likely to happen in any case. It is but reasonable to infer from what both my colleagues say in their opinions that they believe the verdict excessive. The learned counsel of appellee, at the oral argument, admitted that the verdict was too large by consenting to a
230 remitter. It will generally, if not always be so, under a law that makes the employer without fault liable in damages measured by common law standards. Whether influenced by bias and prejudice or not as contended by appellant in this case, the jury will always award damage for mental and physical suffering, elements of damages, as Justice Pitney says in the White case, not chargeable to the employer without fault. The verdict and judgment here emphasize the absolute necessity of compensation in such cases "according to a reasonable and definite scale." If it is not so regulated, it will generally be "so insignificant on the one hand or onerous on the other" as to shock the conscience of the ordinary disinterested person.

The criticism therefore is directed, not at compensation where there is no fault, but at the method or procedure used in ascertaining the compensation.

(Signed) HENRY D. ROSS, *Judge.*

Endorsement: Filed: September 19, 1917. C. F. Leonard, Clerk Sup. Ct.

231 And on the same day, towit, the 2nd day of July, 1917, being one of the regular juridical day- of the said Supreme Court, the following Order and Judgment was had and entered of record in said cause in words and figures as follows, towit:

At this day it is ordered, that the judgment of the lower court made and entered in this cause be and the same is hereby affirmed, Judge Ross dissenting.

It is further ordered, adjudged and decreed, that Frank Tomich, sometimes known as Frank Thomas, appellee herein, do have and recover of and from Superior and Pittsburg Copper Company, a corporation, appellant herein, as principal, and J. E. Curry and M. J. Brophy, sureties on supersedeas bond herein, the principal sum of Eight Thousand ($8,000) Dollars, together with interest thereon at the rate of six per cent per annum from the 29th day of February, 1916, until paid, together with his costs in the lower court in this cause incurred, amounting to One Hundred Six and 25/100
232 ($106.25) Dollars, and his costs in this Court in this cause incurred.

(Title of Court and Cause.)

Motion for Rehearing.

Comes now the appellant in the above entitled cause and moves the court that a rehearing of this cause be granted it upon the decision herein rendered upon the 2nd day of July, 1917, upon the grounds and for the reasons as follows, to-wit:

I.

That this court, in holding that the Employers' Liability Law of Arizona, being Chapter 6 of Title 14, Revised Statutes of Arizona, 1913, does not contravene Section 1 of Amendment 14 to the Constitution of the United States of America, and does not deprive appellant of its property without due process of law, and does not deny to it the equal protection of the law by imposing absolute un-
233 limited liability upon it as an employer for personal injury sustained by its employees while in its employ without regard to and in the absence of any negligence or neglect of duty, nor of care or default upon its part whatsoever, (and so holding said law to be constitutional with respect to the constitution of the United States and the amendments thereto), has reached this decision by reason of misapprehension of the law applicable to and governing the determination of these issues and questions, and by reason of misapprehension of the record in this cause, and is in error in its decision of said issues and questions.

This court bases its decision upon said foregoing issues and questions upon said decision rendered in the case of Inspiration Consolidated Copper Company vs. Mendez, 19 Arizona ——, in which case this court bases its said decision upon the authority of the case of

the New York Central Railroad Co. vs. White, Advance Opinions, 1916, page 247 (not yet reported), a careful examination of which discloses the clearly defined distinction and difference between the issues in this case and those presented in case of Inspiration Consolidated Copper Co. vs. Mendez, 19 Arizona ——, and the issues presented and determined in said case of New York Central Rail-
234 road Co. vs. White, which latter are foreign to the former, all and singular, and in no sense or manner are relevant or pertinent thereto, nor determinative nor authoritative thereof.

In this cause and in the Inspiration case the validity and constitutionality of an Employers' Liability law was the issue presented for determination. In the case of the New York Central Railroad Co. vs. White, the validity and constitutionality of an Employees' Compulsory Compensation law was the issue presented for determination. These are respectively, enactments, not of the same, but of distinct and separate class, upon the face of each apparent. The basic theories and principles from which each of these classes of enactments spring, and upon which each of them respectively rests are so obviously divergent and so set in apposition, the one to the other, that authority determinative of the one class cannot be said to be relevant to or determinative of the other class.

It is clear from the discussion contained in the New York Central case of the theory upon which Compulsory Compensation laws are sustained (and from the authorities collected in said case), doing violence as they do to the ancient principle that there can be
235 no liability without fault, that this class of legislation is sustained by reason of judicial recognition of the necessity for meeting the industrial conditions of society existing in the present stage of human progress, effort and development. In general the conditions designed to be remedied have been the following. The ruinous economic waste attendant upon personal injury litigation between employer and employee, entailing the cost and expense of protracted litigation, the uncertainty of the amount of recovery, the lack of uniformity of the amount of recovery for injuries of like degree, and the many cases in which at common law no recovery could be had, by reason of the purely accidental cause or nature of the injury, where no one is at fault no liability attaches, and the existence of a bar to recovery in many cases because of the presence of contributory negligence, the application of the doctrine of assumption of risk, or the fellow-servant doctrine.

Hence the existing Compulsory Compensation enactments, which in like manner as the New York Act under discussion in the New York case, embodies, in all cases of injury (with certain exceptions not material to this inquiry) sustained by employees engaged in what are known as hazardous occupations, in the course of
236 such employment, liability according to a fixed scale, in the nature of Compensation, based upon the degree of the injury and upon the resultant loss to the injured, calculated upon the earnings of such injured person. In no such law known to jurisprudence is unlimited liability known or recognized, arbitrarily arrived at in the absence of fault upon the part of the employer, and no such

legal situation was presented in the New York Central case, and nowhere in civilization does *and* enactment exist that seeks to impose arbitrarily unlimited liability in the absence of fault upon the part of the person so sought to be subjected to such liability, which thus works a deprivation of property without due process of law, and thus denies to such person the equal protection of the law, save and except in the anomolous case of the Employers' Liability Law of Arizona, being Section 6, Title 14, Revised Statutes of Arizona, 1913.

But so this enactment does, by its express terms, and this unique legal stipulation, sui generis, was not in issue in the New York Central case, and was not considered by the court, the decision of which far from holding such an enactment valid and not in contra-
237 vention of Section 1 of Amendment 14 to the constitution of the United States, specifically indicates that such an enactment transcends and exceeds the limit beyond which legislation may not go, and as clearly indicates that such an enactment would be held insupportable, and we direct the Court's attention to the case of New York Central Railroad Co. vs. White, Advance Opinions, U. S. 1916, page 247.

Page 252, bottom:

"On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary, and just as the employees' assumption of ordinary risks at common law, presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer and the modified assumption of risk by the employee, under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that in such an adjustment the particular rules of the common law affecting the subject matter are not placed by the 14th Amendment beyond the reach of the law making power of the state, and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible State action."

Further, on same page, the court says:

"Of course we cannot ignore the question whether the new arrangement is arbitrary and unreasonable from the standpoint of natural justice."

238 Near the middle of page 253 the court further says in this connection:

"The provision for Compulsory Compensation in the act under consideration cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law."

Further the court says, near the bottom of page 253:

"Viewing the entire matter it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in

money to every disabled employee, or in case of his death, to those who are entitled to look to him for support, in lieu of the common law liability confined to cases of negligence."

And continuing from the top of page 254, the court says:

"This of course is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises."

The court clearly recognizes the existence of a limit beyond which legislation is so abhorrent to justice, so arbitrary and without legal justification, and confiscatory to such extent that it is in contravention of Sec. 1, Amendment 14 to the Constitution of the United States.

The court characterizes the very features already discussed
239 contained in Chapter 6, Title 14, Revised Statutes of Arizona, 1913, as constituting these fatal matters, repugnant to the fundamental principles of our jurisprudence and the solemn guarantee contained in the Federal Constitution.

II.

That this court omitted to consider or pass upon, and did fail wholly to consider or pass upon in its decision of this cause the proposition presented in Appellant's Assignment of Error 1 (Appellant's Brief, pages 8-9, folios 24-26; pages 21-45, folios 62-134); that Chapter 6, Title 14, Revised Statutes of Arizona, 1913, is in contravention of Sec. 1, Amendment 14 to the Constitution of the United States, for the reason that the same by imposing unlimited liability upon Appellant as an employer for personal injury sustained by its employees while in its employ, in the absence of any fault upon its part, denies to Appellant the equal protection of the law.

III.

That this court, in holding that the Employers' Liability Law of Arizona, being Chapter 6, Title 14, Revised Statutes of Arizona, 1913, does not contravene Secs. 5 and 7 of Article 18 of the
240 Constitution of the State of Arizona (and so holding said act to be constitutional with respect to the Arizona Constitution), has reached this decision by reason of misapprehension of the law applicable to and governing the determination of the issues and questions, and by reason of misapprehension of the record in this cause, and is in error in its decision of said issues and questions.

Sec. 5 of Article 18 of the Constitution of Arizona characterizes the plea of contributory negligence as a defense. It must necessarily be such, and was necessarily a present defense when the consituation was adopted and could not be abrogated by a subsequently enacted statute. Being a defense recognized by constitutional enactment, it was a defense unqualified in its limit, and can only be

given its effect and status as established in law then existent, which effect and status could only be that of a bar when established to a jury to whose exclusive province it is committed, and it is by this constitutional enactment, preserved and made available in all cases whatsoever, that is to say, in all cases where recovery should be thereafter sought for personal injury, contributory negligence
241 presupposing an action for personal injury. Being a defense, such a plea when established, constitutes a bar, and it is beyond the limit of subsequent statutory enactment to deprive such plea of its constitutional status and transform it from a defense into a circumstance in mitigation and reduction of the recovery.

Now the constitutional mandate calling for subsequent enactment of an Employers' Liability law, being Sec. 7 of Article 18 of the constitution of Arizona, limits the function and application of such law to those cases of injury wherein the employee was not or is not negligent. The existence of negligence upon the part of the employee is specifically negatived in plain, unambiguous, unequivocal language, in defining the scope and application of the Employers' Liability Law authorized in such mandate. No law was authorized to contemplate or comprehend or embrace those cases of injury wherein negligence upon the part of the employee had any existence. Negligence may exist upon the part of the employee so as to be the sole and only cause of his injury, or negligence may exist upon the part of such employee so as to be a contributing cause to his injury, and must be coupled with the accompanying negligence of the employer. In both of the cases just stated negligence
242 exists upon the part of the employee, but negligence different in degree. The mandate of the constitution does not distinguish between degrees in which negligence exists. It authorizes the enactment of a liability law for those cases wherein negligence upon the part of the employee does not exist and so this court holds in the case of Inspiration Consolidated Copper Co. vs. Mendez, hereinbefore cited. The language of the mandate is plain, clear and unambiguous. It calls for no construction under any known canon, and to extend its authorization to cover classes of injury where negligence or contributory negligence upon the part of the employee exists is to extend the limit defined by the plain verbiage of the mandate beyond the reasonable meaning of its terms and to do violence to the principle laid down by this court in the case of Boehringer vs. Inspiration Company, 17 Arizona 232.

IV.

That this court in holding that a verdict was authorized to be returned against Appellant, because a plea of contributory negligence was interposed in bar of Appellee's right to recover, this constituting an admission of negligence upon the part of
243 Appellant, reached this decision by reason of misapprehension of the law applicable to and governing the determination of such issues, and by reason of misapprehension of the record in this cause, and is in error in its decision of said issues.

We would respectfully urge to this court that such plea cannot by any possibility in law in this action, either constitute an admission of negligence upon the part of Appellant, or that even if it could, it could not authorize the returning of a verdict against Appellant in this cause.

This is a legal impossibility. The present action was brought under the Employers' Liability Law, Chapter 6, Title 14, Revised Statutes of Arizona, 1913, in which negligence under the very terms of the enactment is not an element and does not exist, and no recovery can be based upon negligence upon the part of the employer in such action, and it is so held by this court in the case of Consolidated Arizona S. Co., vs. Ujack, 15 Arizona 382, and in the case of Inspiration Consolidated Copper Company vs. Mendez, 19 Arizona —. Negligence upon the part of the employer resulting in injury is not recoverable in this action, but must be re-
244 covered for in a separate and distinct action, so the Ujack case says. In this action, brought by appellee, negligence upon the part of Appellant, as an employer, has no existence, and is not an element, so says the Inspiration case. Then how, we respectfully submit, can Appellant admit something that has no existence in his cause of action so as to authorize a verdict that under the law of this court cannot be returned in such action?

Negligence upon the part of the employer must be recovered for in a separate and distinct cause of action. Appellee had a perfect right to bring, and he did attempt to join such action with the cause of action here prosecuted, but which he voluntarily abandoned. If we are to indulge in presumptions, it not reasonable to presume that such action was abandoned because to appellee's own knowledge there was no negligence upon the part of Appellant in all the facts upon which he sought to recover?

Shall Appellee prosecute and try one cause of action and on appeal in this court seek to be accorded advantage of the supposed existence of a constituent element of another and different cause of action, and an element foreign to and which does not
245 exist in the case at bar? We respectfully submit the rectitude of our position and pray for consideration and relief.

V.

That this court in holding in its opinion that "no complaint is made that the evidence does not sustain the verdict," has reached its decision by reason of misapprehension of the law applicable to and governing this proposition, and by reason of misapprehension of the record in this cause, and is in error in its decision upon this proposition, and we refer the court to Sec. 4 of Appellant's Assignment of Error 10; Sec. 5 of Appellant's Assignment of Error 10; Sec. 6 of Appellant's Assignment of Error 10, appearing in Appellant's Brief, at pages 18-19, folios 53-55; pages 47-51, folios 139-153.

VI.

That this court, in holding that the asserted presence of prejudice and passion induced an excessive verdict in this cause was not insisted upon as grounds for a new trial, but was first raised on this appeal to you, has reached this decision through misapprehension of the law applicable to and governing this proposition, and by reason of misapprehension of the record in this cause, and is
246 in error in its decision upon this proposition, and we respectfully submit grounds 15-16 and 17 of Appellant's Motion for New Trial, Abstract of Record page 17, folios 50-51, Sub-division 5 of Section 584, Revised Statutes of Arizona, 1913, Section 15, 16 and 17 of Appellant's Assignment of Error 10, Appellant's Brief page 20, folios 58-60, and the argument thereunder; Appellant's Brief, pages 54 to 83, folios 160 to 247, which matters are duly assigned as grounds for new trial in the very words of the statute.

VII.

That this court in holding that it must be presumed that no harm will befall Appellant by reason of the free questioning of witnesses by the court and jury evidencing bias and prejudice because Appellant did not object to the same and resist both the Court and jury, but openly invited full examination into all of the facts in good faith has reached its decision through misapprehension of the law applicable to and governing this proposition, and by reason of misapprehension of the record in this cause, and is in error in its decision upon this proposition.

247 Must a defendant be thus penalized for fairly and in good faith declining to assume the attitude of concealment and unwillingness to bare all facts before a court and jury which throw any light upon the cause? What a damaging stand must he thus be forced to take before his judges. Then when such an inquiry is pursued by the court and jury passion and prejudice is pregnant in every interrogation not justified by a shred of testimony in the record contained, and a verdict so apparently excessive and out of proportion to the degree of injury sustained, to such extent that it is abhorrent to a sense of natural justice is returned, so clearly influenced by the extraordinary state of mind evidenced by the jury in this case, must such a defendant be denied relief because it did not set itself in resistance to the trial jury, being at its mercy, and thus further influence the existant bias? Can we take the repeated, voluntary, uncalled for, unmerited expressions establishing this bias beyond controversy out of this case and say that it does not exist and obliterate its effect because the defendant did not assume the attitude of unfairness, hostility and concealment before the jury in the trial of this cause? Certainly it is the ex-
248 istence of prejudice and bias and its effect that a defendant is entitled not to suffer for, and the fact that defendant did not combat the jury should not be permitted by every considera-

tion of natural justice to deprive it of a fair and impartial trial. We, in all earnestness, respectfully submit this to your Honors. We do not desire to again, in detail, assemble from the pages of the record the considerable number of these incidents of clearly expressed bias. They stand out unmistakeably, it would serve no useful purpose to tabulate them for the second time, or to enter into a further discussion of the same, but we would again respectfully refer the court to pages 54 to 83, folios 160 to 247 of Appellant's Brief, where the same have been in detail heretofore presented, and in all earnestness we respectfully submit that this abnormal situation presented calls for merited relief.

VIII.

That the court in holding that the Appellant is entitled to no relief because it does not "conclusively" appear that the verdict was influenced by passion and prejudice has reached its decision upon this proposition by reason of misapprehension of law applicable to
249 and governing same, and by reason of misapprehension of the record in this cause, and is in error in its decision upon this proposition, we respectfully submit that to require Appellant to conclusively establish such a state of facts is a burden that perhaps can never be carried by any defendant or appellant at any time under any state of facts imaginable, and puts any party litigant beyond possibility of relief, however, unfair the trial has been to which he was subjected, or however, apparent such matters may be upon the face of the record, there might always exist some ground for holding a contrary opinion, and though such features were established to the satisfaction of any reasonable man upon the record and call for relief, no injustice could be remedied because the absolute property of conclusiveness is almost universally absent from human affairs generally, and from litigation in particular. It has heretofore appeared to be the law of Arizona that if it appears from an examination of the entire case that the verdict returned has been influenced by passion and prejudice it should be set aside and a new trial granted, and in such case no remittitur should be ordered. We submit the case of
250 S. P. Co. vs. Tomlinson, 4 Arizona 126; S. P. Co. vs. Fitchett, 9 Arizona 128; Gila Valley Railroad Co. vs. Hall, 13 Arizona 276.

IX.

That this court in holding that the verdict was not excessive, and that the determination of such action is for the exclusive province of the jury (or in the words of the Court, "the verdict returned is large in amount, but the matter lay with the jury.") and that no complaint was made that the verdict was not sustained by substantial evidence has reached its decision upon these propositions by reason of misapprehension of the law applicable to and governing the same, and by reason of misapprehension of the record in this cause, and is in error in its decision upon these propositions. We respect-

fully submit that complaint is made that the verdict is not sustained by substantial evidence, Appellant's Brief page 81, folios 239-244.

That it is not within the exclusive province of the jury as to which the Appellate Court may not inquire and grant proper relief, to finally determine the amount of recovery; we respectfully refer the court to Iæger vs. Metcalf, 11 Arizona 290; McGill vs. S. P. Co., 4 Arizona 116, which principle is clearly recognized in the
251 specially concurring opinion of Chief Justice Franklin, filed in this cause.

Complaint is not made merely that the verdict is excessive in amount only, but that it is so excessive and influenced by passion and prejudice. We respectfully refer the court to Sections 15, 16 and 17 of Appellant's Assignment of Error 10; Appellant's Brief page 20, folios 58-60, pages 80-81, folios 239-244, and in such situation, which we submit in all earnestness that the record sustains, the verdict should be set aside and a new trial granted. S. P. Co. vs. Fitchett, 9 Arizona 128; S. P. Company vs. Tomlinson, 4 Arizona 126; Gila Valley Railroad vs. Hall, 13 Arizona 276.

And no remittitur is proper to be ordered if from an examination of the whole case the verdict appears to have been influenced by passion and prejudice.

That the court has the undoubted right to so order a remittitur cannot be questioned, whether Sec. 578, Revised Statutes of Arizona, 1913, (referred to in specially concurring opinion of Chief Justice Franklin in this cause) exists or not, but we respectfully represent to this court that under the authorities herein presented, and
252 upon the state of the record in this cause, where bias and prejudice has so obviously influenced a verdict excessive upon its face, that a remittitur should not be countenanced as it is very justly held improper by the courts. Appellant's counsel, in the argument in this cause, according to his best recollection, does avow that he urged as strenuously as he was able the utter impropriety of a remittitur in such a case as this. He did not defy the court to order such, but believing it under the state of all of the law to be improper, so argued.

Section 578, Revised Statutes of Arizona, 1913, does not, we take it, enlarge upon the power of this court in the matter of a remittitur, nor does it render the same necessary in any improper case, but leaves the court with the same degree of power that it possessed before such section had any existence as an enactment. When a verdict is merely excessive in amount it cannot be denied that a remittitur and not a new trial is proper, but where the element of prejudice or bias has entered into the rendition of a verdict, we believe the courts are unanimous in holding that a party litigant who has been subjected to such a verdict is entitled to a fair and impartial trial, at
253 which damage may be fairly assessed against him, and we know of no method whereby such a party may be accorded his rights under the law other than by a new trial, and Appellant's counsel urged the court, in all earnestness, that a new trial be granted it. The amount of the verdict in this case even shocked the conscience of Appellee, as the Appellee appeared to be quite willing that

a remittitur should be ordered, as stated in the specially concurring opinion of Chief Justice Franklin in this cause.

And we respectfully submit that we are entitled to a new trial, that we may have a fair and impartial one, and so, we earnestly and respectfully pray that our motion for a rehearing be granted upon the grounds herein contained, all and singular.

CLEON T. KNAPP,
C. R. WOODS,
BOYLE & PICKETT,
Attorneys for Appellant.

254 (Title of Court and Cause.)

Affidavit of Service of Motion for Rehearing.

STATE OF ARIZONA,
County of Cochise, ss:

C. R. Woods, being first duly sworn, upon his oath deposes and says that he is one of the attorneys for the Appellant in the above entitled cause, that upon the 16th day of July, 1917, he did serve a true and correct copy of the hereto attached Motion for Re-hearing upon J. T. Kingsbury, one of the attorneys for the Appellee in the above entitled cause in the following manner, to-wit:

That he did on said date deposit a true and correct copy of said motion for rehearing in the United States post office at Bisbee, Arizona, enclosed in a sealed envelop-, addressed to J. T. Kingsbury at his place of residence in Tombstone, Arizona, having first prepaid the postage thereon, there then and there being regular communication by mail between Bisbee and Tombstone, Arizona.

C. R. WOODS.

255 Subscribed and sworn to before me this 17th day of July, 1917.

[SEAL.]

C. F. LEONARD,
Clerk Supreme Court.

Due service by true copy is hereby admitted at Bisbee, Arizona, this 16th day of July, 1917.

J. T. KINGSBURY,
FRED SUTTER,
Attorneys for Appellee.

Filed July 17th, 1917. C. F. Leonard, Clerk Supreme Court.

256 And on, towit, the 25th day of September, 1917, being one of the regular juridical days of the said Supreme Court, the following Order was had and entered of record in said cause, in words and figures as follows, towit:

At this day it is ordered, that the Motion for Rehearing filed herein by Appellant be and the same is hereby denied.

Mandate.

In the Supreme Court of the State of Arizona.

[SEAL.]

To the Honorable the Superior Court of the State of Arizona in and for the County of Cochise, Greeting:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Cochise, before you in a cause between Frank Tomich, sometimes known as Frank Thomas, Plaintiff, and Superior & Pittsburg Copper Company, a corporation, Defendant, No. 1007; wherein the judgment of the said Superior Court, made and entered therein on the 29th day of February, 1916, is in the following words, viz:

257 "This cause came on regularly for trial on the fifteenth day of February, 1916. Fred Sutter and J. T. Kingsbury appeared as counsel for plaintiff; and Knapp & d'Autremont and H. E. Pickett appeared as counsel for defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, with the verdict signed by the foreman, and, being called, answered to their names; and the foreman delivered to the Court the verdict so signed, which said verdict the Court received, and caused to be read and recorded, and which said verdict was in words and figures as follows, to-wit:

'In the Superior Court, County of Cochise, State of Arizona.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Plaintiff,

vs.

SUPERIOR & PITTSBURG COPPER COMPANY, Defendant.

Verdict.

258 We, the Jury, duly empaneled and sworn in the above entitled action, upon our oaths do find: for the Plaintiff in the sum of $8,000, Eight Thousand Dollars.

F. B. STEELE, *Foreman.*'

"Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, and adjudged, and decreed, that said plaintiff have and recover from said defendant the sum of Eight Thousand Dollars ($8,000.00), lawful money of the United States, with legal interest thereon from date hereof until paid, together with plaintiff's

costs and disbursements incurred in this action, amounting to the sum of One Hundred Six and Twenty-five-One-Hundredths Dollars ($106.25).

"Done in open Court this 29th day of February, 1916.

ALFRED C. LOCKWOOD, *Judge*";

as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by the Defendant agreeably to the law in such cases made and provided fully and at large appears.

259 And whereas, in January, in the year of our Lord one thousand nine hundred and seventeen, the said cause came on to be heard before the said Supreme Court.

On consideration whereof, it was on the second day of July, in the year of our Lord one thousand nine hundred and seventeen, ordered by this Court that the judgment of the said Superior Court in this cause be and the same is hereby affirmed, Judge Ross dissenting.

It is further ordered, adjudged and decreed, that Frank Tomich, sometimes known as Frank Thomas, appellee herein, do have and recover of and from Superior and Pittsburg Copper Company, a corporation, appellant herein, as principal, and J. E. Curry and M. J. Brophy, sureties on supersedeas bond herein, the principal sum of Eight Thousand ($8,000) Dollars, together with interest thereon at the rate of six per cent per annum from the 29th day of February, 1916 until paid, together with his costs in the lower court in this cause incurred amounting to One Hundred Six and 25/100 ($106.25) Dollars, and his costs in this Court in this cause incurred.

260 You therefore are hereby commanded that such proceedings be had in said cause as according to right and justice, and to law, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Alfred Franklin, Chief Justice of the Supreme Court of the State of Arizona, the sixth day of October, in the year of our Lord one thousand nine hundred and seventeen.

(No cost bill filed.)

C. F. LEONARD,
Clerk of the Supreme Court of the State of Arizona.

Filed: Oct. 8, 1917. J. E. James, Clerk Superior Court.

261 In the Supreme Court of the State of Arizona.

No. 1535.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Plaintiff in Error,

vs.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Defendant in Error.

Petition for Writ of Error.

To the Hon. Alfred Franklin, Chief Justice of the Supreme Court of the State of Arizona:

Comes now the Superior & Pittsburg Copper Company, a corporation, the plaintiff in error above named, and respectfully
262 shows by this petition, in this its petition for writ of error, the following matters and things, to-wit:

I.

That in the above entitled cause, upon the 2nd day of July, 1917, the Supreme Court of the State of Arizona, the same being the highest court of said State in which a decision could be had in this suit, did, in said cause, render its judgment and decision in favor of Frank Tomich, sometimes known as Frank Thomas, the above named defendant in error, and against the Superior & Pittsburg Copper Company, a corporation, the above named plaintiff in error.

II.

That upon the 17th day of July, 1917, said plaintiff in error did file in the Supreme Court of the State of Arizona, in the above entitled cause, its proper motion for rehearing.

263 III.

That upon the 25th day of September, 1917, the Supreme Court of the State of Arizona did render and enter its order denying and overruling said motion for re-hearing of said plaintiff in error, whereupon, upon said last mentioned date, the judgment of the Supreme Court of the State of Arizona, in the above entitled cause, did become final.

IV.

That, as appears in the record and proceedings in the Supreme Court of the State of Arizona, in the above entitled cause, there was drawn in question the validity of Chapter 6 of Title XIV of the

Revised Statutes of Arizona, 1913, known as "The Employers' Liability Law of Arizona," upon the ground that the same is and was repugnant to, in contravention of and in violation of the constitution of the United States of America in this, to-wit: That there was drawn in question the validity of said Chapter 6 of Title
264 XIV, Revised Statutes of Arizona, 1913, and the authority exercised thereunder, upon the ground that the same, all and singular, is and was repugnant to and in contravention of Section 1 of Amendment 14 to the Constitution of the United States of America, in that the same, all and singular, did and does deprive plaintiff in error of its property without due process of law, and did and does deny to plaintiff in error the equal protection of the law by imposing absolute, unlimited liability upon it as an employer for personal injury sustained by its employees while in its employ without regard to and in the absence of any negligence or neglect of duty, and in the absence of any want of care or default whatsoever upon the part of plaintiff in error.

V.

That the foregoing questions, matters and things were all and singular duly and fully and properly presented and submitted to the Supreme Court of the State of Arizona, and that as aforesaid the said last mentioned court did render and enter its judgment
265 and decision therein and upon the same, all and singular, and that the said judgment and decision is and was in favor of the validity of said Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, and in favor of the validity of the authority exercised thereunder, and it was the decision and judgment of said last mentioned Court that said Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, and the authority exercised thereunder was and is, all and singular, not repugnant to or in contravention of Section 1 of Amendment 14 to the Constitution of the United States of America.

VI.

That the Supreme Court of the State of Arizona is and was the highest court of the State of Arizona in which a decision could be had in this cause and upon the foregoing questions, matters and things, all and singular.

That the said decision and judgment aforementioned of the Supreme Court of the State of Arizona in this cause is mani-
266 festly error, and that the plaintiff in error considers itself aggrieved by the said final decision of the Supreme Court of the State of Arizona in rendering its judgment and decision against plaintiff in error in said cause.

Wherefore petitioner prays that a writ of error be allowed, and that a transcript of record, proceedings and papers upon which the

decision and judgment in this cause was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States of America, at Washington, D. C., under the rules *or* such Court in such cases made and provided, in order that the same may, by the said Supreme Court of the United States of America, be inspected and corrected in accordance with law and justice.

(Signed) CLEON T. KNAPP,
(Signed) BOYLE & PICKETT,
Attorneys for Petitioner.

Endorsement: Filed Nov. 19, 1917. C. F. Leonard, Clerk Supreme Court.

VII.

267 (Title of Court and Cause.)

Order Allowing Writ of Error.

On this 19th day of November, 1917, the application of the Superior & Pittsburg Copper Company, a corporation, plaintiff in this cause, for a writ of error came on to be heard, said plaintiff in error being represented by counsel, and it appearing to the Court, from the petition filed herein and from the record and proceedings in this cause in this court filed, that its application should be granted, and that a transcript of the record, proceedings and papers upon which the judgment of the court was rendered, properly certified, should be sent to the Supreme Court of the United States of America, as prayed, in order that such proceedings may be had as may be just.

Now, therefore, it is ordered that the writ of error be allowed upon bond being furnished by the plaintiff in error, conditioned according to law, in the sumof twelve thousand dollars, and that said bond, when approved, shall operate as a supersedeas; and that a true copy of the record, assignment of errors and all proceedings in the case in
268 in the Supreme Court of the State of Arizona shall be transmitted to the Supreme Court of the United States of America, duly certified according to law, in order that said Court may inspect the same and take such action thereon as it deems proper according to law.

In witness whereof I have hereunto set my hand, at Phœnix, Arizona, on this the 19th day of November, 1917.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court of the State of Arizona.

UNITED STATES OF AMERICA,
District of Arizona, ss:

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby certify the above and foregoing to

be a true and correct copy of the original order signed by Alfred Franklin, Chief Justice of the Supreme Court of the State of Arizona, allowing the issuance of a Writ of Error in the case of Superior & Pittsburg Copper Company, a corporation, Plaintiff in Error, vs. Frank Tomich, sometimes known as Frank Thomas, Defendant in Error, No. 1535 in the said Supreme Court of the State of Arizona, as the same appears from the original order on file in the Clerk's office at Tucson.

Witness my hand and the seal of said Court affixed hereto at Tucson, Arizona, this 20th day of November, A. D., 1917.

269

(Signed) MOSE DRACHMAN, *Clerk*,
By EFFIE D. BOTTS,
Deputy Clerk.

Endorsement: Filed November 21, 1917. C. F. Leonard, Clerk Supreme Court.

Supreme Court of the United States.

No. —.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Plaintiff in Error,

vs.

FRANK TOMICH, Sometimes Known as Frank Thomas, Defendant in Error.

Bond.

Know all men by these presents:

That we, Superior & Pittsburg Copper Company, as principal, and M. J. Cunningham and L. C. Shattuck, as sureties, are held and firmly bound unto the said Frank Tomich, in the sum of Twelve Thousand ($12,000.00) Dollars, to be paid to the said Frank Tomich, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this Sixteenth day of November, A. D. 1917.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Su-

270 preme Court of the State of Arizona.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be ad-

judged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

SUPERIOR & PITTSBURG COPPER COMPANY,
(Signed) By A. W. ENGLDER, *Chief Clerk.*
M. J. CUNNINGHAM.
L. C. SHATTUCK.

STATE OF ARIZONA,
County of Cochise, ss:

M. J. Cunningham and L. C. Shattuck being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Arizona, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of Twelve Thousand ($12,000.00) Dollars, over and above all debts, liabilities and exemptions.

(Signed) M. J. CUNNINGHAM.
L. C. SHATTUCK.

Subscribed and sworn to before me this 16th day of November, A. D. 1917.

[NOTARY SEAL.]

(Signed) CHARLES R. WOODS,
Notary Public, Cochise County, Arizona.

My Commission Expires May 23rd, 1921 (1921). C. R. W.

The above bond is approved:

(Signed) ALFRED FRANKLIN,
Chief Justice of the State of Arizona.

Endorsement: Filed Nov. 21, 1917. C. F. Leonard, Clerk Supreme Court.

271 *Assignment of Errors.*

(Title of Court and Cause.)

Comes now the plaintiff in error in the above entitled cause, being the defendant and appellant in the above entitled court, and files herewith its following assignments of errors, upon which it will rely upon its prosecution of the writ of error in the above entitled cause from the judgment and decision made by the Honorable Supreme Court of the State of Arizona in this said cause.

I.

The Supreme Court of the State of Arizona erred in holding that the complaint of plaintiff and defendant in error stated a cause

of action against defendant and plaintiff in error, and in holding that the demur-er of defendant and plaintiff in error to said complaint of plaintiff and defendant in error should have been overruled for the reasons as follows, to-wit:

That the complaint showed upon its face that plaintiff and
272 defendant in error sought to recover judgment against the defendant and plaintiff in error under and by virtue of Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, known as "The Employers' Liability Law," and Section 7 Article 18 of the Constitution of the State of Arizona; that the aforementioned statutory enactments and said Section 7 of Article 18 of the Constitution of the State of Arizona are both null and void, for the reason that they are repugnant to, in contravention of and in violation of Section 1 of Amendment 14 to the Constitution of the United States of America, in that said Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, and Section 7 of Article 18 of the Constitution of the State of Arizona, attempt to deprive the defendant and plaintiff in error of its property without due process of law, and deny to it the equal protection of the law by imposing absolute, unlimited liability upon defendant and plaintiff in error, as an employer, for personal injuries sustained by employees while in
273 its employ, in cases where defendant and plaintiff in error has been guilty of no fault, want of care or neglect of duty toward such employees; and therefore the complaint of plaintiff and defendant in error did not, and does not, state facts sufficient to constitute a cause of action against defendant and plaintiff in error, and the demurrer of said defendant and plaintiff in error should have been sustained and the Supreme Court of the State of Arizona should have so held.

II.

In like manner the trial court, being the superior Court in and for the County of Cochise, in the State of Arizona, erred in holding that the complaint of plaintiff and defendant in error stated facts sufficient to constitute a cause of action against defendant and plaintiff in error, and in overruling the demurrer of defendant and plaintiff in error to said complaint of plaintiff and defendant in error, for the same reasons.

III.

The Supreme Court of the State of Arizona erred in hold-
274 ing that Chapter 6 of Title XIV, Revised Statutes of Arizona, 1913, known as "The Employers' Liability Law," and the provisions thereof, were valid and constitutional and not repugnant to, in contravention of and in violation of Section 1 of Amendment 14 to the Constitution of the United States of America, for the reason that said Employers' Liability Law attempts to and does deprive the defendant and plaintiff in error of its property without due process of law, and denies to it the equal protection of the law, by imposing absolute, unlimited liability arbitrarily upon it, as an employer, for

personal injuries sustained by employees while in its employ in cases where defendant and plaintiff in error has been guilty of no fault, want of care or neglect of duty whatsoever.

IV.

The Supreme Court of the State of Arizona erred in holding that the trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, should not have instructed the jury to return a verdict in favor of the defendant and plain-
274½ tiff in error, upon motion made by said defendant and plaintiff in error, when the plaintiff and defendant in error had rested his case in said trial court, for the reasons as follows, to-wit:

That the complaint of plaintiff and defendant in error showed upon its fact that it was an action brought under the provisions of Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, and Section 7 of Article 18 of the Constitution of the State of Arizona; that said complaint did not allege any want of care or neglect of duty whatsoever upon the part of defendant and plaintiff in error by reason of which the injury complained of occurred, but sought to recover for such injury in the utter absence of any such fault, want of care or neglect of duty under the aforementioned provisions, which, all and singular, are null and void, being repugnant to and in contravention of Section 1 of Amendment 14 to the Constitution of the United States of America, in that the same, all and singular, deprive defendant and plaintiff in error of its property with-
275 out due process of law and deny to it the equal protection of the laws by imposing upon it, as an employer, absolute, unlimited liability arbitrarily for personal injuries sustained by its employees while in its employ in cases where defendant and plaintiff in error has been guilty of no fault, want of care or neglect of duty whatsoever, and therefore plaintiff and defendant in error had not made out any case at all against defendant and plaintiff in error upon which any liability could be based or predicated.

V.

The trial Court, being the Superior Court in and for the County of Cochise, in the State of Arizona, erred in denying and overruling the motion made by defendant and plaintiff in error when the plaintiff and defendant in error had rested his case, and instructed the jury to return a verdict in favor of the defendant and plaintiff in error for the same reasons.

VI.

The Supreme Court of the State of Arizona erred in holding that the following instructions, asked by the defendant and plaintiff in error of the trial court, should not have been given, to-wit:
276 "You are instructed that unless you find from the evidence that negligence on the part of the defendant in this case was the cause of the injury sustained by the plaintiff, then you must find

for the defendant, for the reason that there can be no liability without fault in such a case as this," for the reason that no arbitrary, unlimited liability can be imposed in the absence of fault, want of care or neglect of some duty, and the complaint of plaintiff and defendant in error sought to recover such, based upon the provisions of Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, which imposed such liability and the instruction requested, above set out, should have been given.

VII.

The trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, erred in refusing the following instruction asked by the defendant: "You are instructed that unless you find from the evidence that negligence on the part of the defendant in this case was the cause of the injury sustained by
277 the plaintiff, then you must find for the defendant, for the reason that there can be no liability without fault in such a case as this," for the same reasons.

VIII.

The Supreme Court of the State of Arizona erred in holding that the trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, in instructing the jury, properly read to the jury the provisions of Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, for the reason that said enactment was not and is not properly a law of this case, for the reason that the same is null and void, and is repugnant to and in contravention of Section 1 of Amendment 14 to the Constitution of the United States of America, in the particulars and for the matters set out in the foregoing assignment of error No. 1, which is hereby referred to to avoid repetition.

IX.

The trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, erred in reading to the jury in instructing the jury the provisions of Chapter 6 of Title
278 XIV of the Revised Statutes of Arizona, 1913, for the same reasons.

X.

The Supreme Court of Arizona erred in affirming the judgment of the trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, by reason of the matters and things, all and singular, hereinbefore set out in the foregoing assignments of error.

XI.

The trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, erred in refusing to set aside the verdict and the judgment in this cause, and to grant to defendant and plaintiff in error a new trial in said cause, by reason of the matters and things, all and singular, set out in the foregoing assignments of error and contained in the motion for new trial in this cause in said Court, and which appears in the record in this cause.

XII.

The Supreme Court of the State of Arizona erred in denying and overruling the motion for re-hearing of defendant and plaintiff in error in this cause filed in said Court, because of the mat-
279 ters and things, all and singular, set out in the foregoing assignments of error and contained in said motion for re-hearing, which appears in the record in this cause and to which reference is hereby made for the sake of brevity and to avoid repetition of said matters and things contained in said foregoing assignments of error.

Wherefore, plaintiff in error prays that the said judgment and decision of the Supreme Court of the State of Arizona be reversed, and that said Supreme Court of the State of Arizona, be ordered to enter its judgment reversing the decision and judgment of the trial court, being the Superior Court in and for the County of Cochise, in the State of Arizona, in this cause, and that judgment be rendered in said cause in favor of the plaintiff in error herein and against the defendant in error herein.

(Signed) CLEON T. KNAPP,
BOYLE & PICKETT,
Attorneys for Plaintiff in Error.

Endorsement: Filed November 19, 1917. C. F. Leonard, Clerk Supreme Court.

280 *Præcipe.*

(Title of Court and Cause.)

To the Honorable C. F. Leonard, Clerk of the Supreme Court of the State of Arizona:

You are hereby directed to prepare, according to the law in such cases made and provided, and the proper orders of this court, a transcript of the record and proceedings in the above entitled cause in the above entitled Court for transmission, in due course, to the Supreme Court of the United States of America, pursuant to the writ of error in said cause duly allowed heretofore, all properly

certified and including the following matters and things, all and singular, to-wit:

1. Plaintiff's complaint.
2. Defendant's fourth amended answer.
3. Instructions requested by defendant.
4. Instructions given by the trial court.
5. The verdict returned by the jury.
6. The judgment rendered and entered in and by the trial court.
7. The minute entries of the trial court, all and singular.
8. Defendant's motion for new trial.
9. Notice of appeal by defendant.
10. Supersedeas bond on appeal.

281 11. Notice of filing of transcript with clerk of trial court.
12. Stipulation for a certification of transcript.
13. The testimony of the following named witness-s in the trial court, to-wit:

Garfield Anjov.
Chas. F. Hawley.
H. H. Hugart.
Ed Massey.
Wm. McDonald.
Thomas A. Murphy.
Frank Tomich.
Katie Tomich.

14. Affidavits of Hubert H. d'Autremont and H. E. Pickett in support of motion for new trial.
15. The opinion and decision of the Supreme Court of Arizona in this cause, and the mandate of this court herein issued.
16. The dissenting opinion of Mr. Justice Ross in the Supreme Court of the State of Arizona in this cause.
17. Each and all of the orders and minute entries made and entered in the Supreme Court of the State of Arizona in this cause.
18. The motion for re-hearing filed by appellant in this cause.
19. The order of the Supreme Court of Arizona denying said motion for re-hearing in this cause.
20. Petition for writ of error in this cause to the Supreme Court of the United States of America.
21. The order allowing said writ of error, with order for supersedeas bond in this cause.
22. The bond on said writ of error in this cause.

282 23. The assignment of errors, with prayer for reversal in this cause.
24. The original writ of error in this cause.
25. The citation upon the writ of error in this cause.
26. This præcipe.

Respectfully,

(Signed) CLEON T. KNAPP,
BOYLE & PICKETT,
Attorneys for Plaintiff in Error.

Endorsement: Filed November 21, 1917. C. F. Leonard, Clerk Supreme Court.

283 In the Supreme Court of the State of Arizona.

Clerk's Certificate.

SUPREME COURT,
State of Arizona, ss:

I, C. F. Leonard, Clerk of the Supreme Court of the State of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 282, inclusive, contain a full, true and complete transcript of the Plaintiff's Complaint, Defendant's Fourth Amended answer, Instructions requested by defendant, Instructions given by the trial Court, the Verdict of the Jury, the Judgment rendered by the trial court, Minute entries of the trial court, Defendant's Motion for new trial, Notice of Appeal by defendant, Supersedeas Bond on appeal, Notice of filing transcript with Clerk of trial court, Stipulation for a certification of transcript, The testimony of Garfield Anjov, Chas. F. Hawley, H. H. Hugart, Ed. Massey, Wm. McDonald, Thomas A. Murphy, Frank Tomich and Katie Tomich; Affidavits of H. d'Autremont and H. E. Pickett in support of motion for new trial,
284 Opinion and decision of the Supreme Court of Arizona in this cause, and Mandate issued; Dissenting opinion of Mr. Justice Ross; all Orders and Minute entries, Motion for re-hearing by appellant, Order denying motion for re-hearing, Petition for writ of error to the Supreme Court of the United States, Order allowing writ of error, Supersedeas bond on writ of error, Assignments of error and prayer for reversal and præcipe, in Cause No. 1535, wherein Superior & Pittsburg Copper Company, a corporation is Appellant, and Frank Tomich, sometimes known as Frank Thomas, is Apellee; as the same remain on file and of record in my office; being all that portion of the original record indicated by the Appellant herein by its præcipe filed in said cause, as necessary to the consideration of the questions to be reviewed on Writ of Error to the Supreme Court of the United States.

And I further certify that the Writ of Error and Citation, showing service thereon and hereto attached, is the original Writ of Error and Citation issued by the said Supreme Court of the State of Arizona in the above entitled cause.

285 In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Arizona, at the City of Phœnix this 20th day of December, A. D., 1917.

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,
Clerk of the Supreme Court of the State of Arizona.

286 In the Supreme Court of the United States of America.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Plaintiff in Error,

vs.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Justices of the Supreme Court of the State of Arizona, Greeting:

Whereas, in the record and proceeding and in the rendition of the judgment of the above entitled cause, which is now before you, or some of you, between Frank Tomich, sometimes known as Frank Thomas, plaintiff and appellee, and The Superior & Pittsburg Copper Company, a corporation, defendant and appellant, your Court being the highest court of said State having jurisdiction of the cause, there was drawn in question the validity of Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, and the provisions thereof, and the authority exercised thereunder, all and singular, upon the ground that the same, all and singular, is and was repugnant to and in contravention of Section 1 of Amendment 14 to the Constitution of the United States of America, and the decision of your court was in favor of the validity of said Chapter 6 of Title XIV of the Revised Statutes of Arizona, 1913, and of the provisions thereof, and the authority exercised thereunder, all and singular; and, whereas, there is manifest error in said decision, to the damage of said The
287 Superior & Pittsburg Copper Company, a corporation, the petitioner in error; and, whereas, we are willing that if there is error it should be duly corrected, we command you therefore if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of The United States of America, together with this writ, so that you have the same in the said Supreme Court, at Washington, D. C., within sixty days from the date hereof, that the record and proceedings in said cause being inspected, the said Supreme Court of the United States of America may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States this 20th day of November, 1917.

[Seal United States District Court, District of Arizona.]

MOSES DRACHMAN,
Clerk of the United States District Court
for the District of Arizona.

Allowed on this 21st day of November, 1917, by
ALFRED FRANKLIN,
Chief Justice of the Supreme Court of the State of Arizona.

288 Service of the within Writ of Error is hereby acknowledged this 20th day of Nov. 1917.

FRED SUTTER,
Of Bisbee, Arizona;
J. T. KINGSBURY,
Of Tombstone, Arizona,
Attorneys for Defendant in Error.

[Endorsed:] In the Supreme Court of the United States of America. Superior & Pittsburg Copper Company, a corporation, Plaintiff in Error, vs. Frank Tomich, sometimes known as Frank Thomas, Defendant in Error. Writ of Error. Filed Nov. 21, 1917. C. F. Leonard, Clerk Supreme Court. Cleon T. Knapp, of Bisbee, Ariz., Messrs. Boyle & Pickett, of Douglas, Arizona, Attorneys for Plaintiff in Error.

289 In the Supreme Court of the United States of America.

SUPERIOR & PITTSBURG COPPER COMPANY, a Corporation, Plaintiff in Error,

vs.

FRANK TOMICH, Sometimes Known as FRANK THOMAS, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Justices of the Supreme Court of the State of Arizona, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States of America, at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Arizona, wherein the Superior & Pittsburg Copper Company, a corporation, is plaintiff in error and you are defendant in

error, to show cause, if any there be, why the judgment and decision rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Arizona, this 21st day of November, 1917.

ALFRED FRANKLIN,
Chief Justice of the Supreme Court of the State of Arizona.

290 Attest:

[Seal Supreme Court, State of Arizona.]

C. F. LEONARD,
Clerk of the Supreme Court of the State of Arizona.

Bisbee, Arizona, November 21st, 1917.

We, the attorneys of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above and foregoing citation, and we do hereby enter an appearance in the Supreme Court of the United States of America.

FRED SUTTER,
J. T. KINGSBURY,
Attorneys for Frank Tomich, Sometimes Known as Frank Thomas, the Defendant in Error.

291 Service of the within citation is hereby acknowledged this 21st day of November, 1917.

FRED SUTTER,
Of Bisbee, Arizona;
J. T. KINGSBURY,
Of Tombstone, Arizona,
Attorneys for Defendant in Error.

[Endorsed:] In the Supreme Court of the United States of America. Superior & Pittsburg Copper Company, a corporation, Plaintiff in Error, vs. Frank Tomich, sometimes known as Frank Thomas, Defendant in Error. Citation. Filed Nov. 21, 1917. C. F. Leonard, Clerk Supreme Court. Cleon T. Knapp, of Bisbee, Arizona, Messrs. Boyle & Pickett, of Douglas, Arizona, Attorneys for Plaintiff in Error.

Endorsed on cover: File No. 26,289. Arizona Supreme Court. Term No. 822. The Superior & Pittsburg Copper Company, plaintiff in error, vs. Frank Tomich, sometimes known as Frank Thomas. Filed January 22d, 1918. File No. 26,289.

INDEX

LIST OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917

No. 822.

SUPERIOR & PITTSBURG COPPER COMPANY, a corporation,
Plaintiff in Error.

vs.

FRANK TOMICH, sometimes known as Frank Thomas,
Defendant in Error.

Brief for Plaintiff in Error

STATEMENT.

This case comes before this Court upon the question of the validity of the Arizona Employers' Liability Law, (Chapter 6, Title 14, Revised Statutes of Arizona, 1913. See Appendix "A"). The same question has been presented to this Court in the following cases, and is now under consideration:

Arizona Copper Company, Limited vs. Joseph B. Hammer. No. 161. *Ari-*

zona Copper Company, Limited, vs. Richard Bray. No. 162; both argued and submitted January 26th, 1918;

Ray Consolidated Copper Company vs. Dan Veazey. No. 603; argued and submitted January 28th, 1918;

Also

Inspiration Consolidated Copper Company vs. Mendez. No. 819;

Superior & Pittsburg Copper Company vs. Steve Davidovich, sometimes known as Steve Davis. No. 592, October 1918 Term, and this case, No. 822.

Counsel in presenting this brief is assuming that the question raised as to the constitutionality of the Arizona Employers' Liability Law will be determined by this Court before consideration of the herein case, or the consideration of this brief. However, a statement of the case can be made, though nothing new may be added to briefs submitted in the cases just before named.

This action was brought by Frank Tomich for $15,000.00 damages for personal injuries, resulting in the loss of the tips of the fore, middle and ring fingers of the right hand; amputation being made between the first joint and the finger nails. The accident occurred when Tomich released the door and pushed his ore car into the dump board with such force that the momentum carried the car forward, wheels up, and the back end hit the protecting bar,

catching Tomich's fingers, while he still held involuntarily to the car.

The complaint alleged two causes of action; one under the Arizona Employers' Liability Law; and one under the common law, which charged plaintiff in error with negligence (Record, pp. 1-5). Later the common law cause was dimissed (Record, p. 97) and the case was tried under the Employers' Liability Law, after demurrer to same had been overruled (Record, p. 97). The question of negligence of plaintiff in error was not an issue. The jury returned a verdict for $8000.00 for Tomich.

ASSIGNMENT OF ERROR AND QUESTION PRESENTED.

The question presented then is the same as in the cases before named, to-wit: Is the said Arizona Employers' Liability Law unconstitutional in that its provisions deprive the plaintiff in error of its property, without due process of law, and denies to it the equal protection of the law by subjecting it to unlimited liability for damages for personal injuries suffered by its employees without any fault or negligence on the part of plaintiff in error causing or contributing thereto; in contravention to the Fourteenth Amendment to the Constitution of the United States.

POINTS

AS EXERCISE OF POLICE POWER

Under the laws of Arizona Tomich had the legal right to pursue one of three remedies after injury:

1. The Common Law, relieved of the fellow-servant defence.
2. The Employers' Liability Law, applying to hazardous occupations when the injury or death is not caused by employee's negligence.
3. Compulsory Compensation Law applying to dangerous occupations.

Consolidated Arizona Smelting Company vs. Ujack, 15 Ariz. 382; 139 Pac. 465.

Tomich having proceeded under the Employers' Liability Law, was not required to, and did not show negligence or fault upon the part of the plaintiff in error. In fact, the plaintiff in error was even precluded from showing that it was not guilty of any negligence or fault, as that question under that peculiar law, was not an issue in the case. The law imposes an unlimited liability on the employer irrespective of fault or negligence.

Inspiration Consolidated Copper Company vs. Mendez, 166 Pac. 278; [redacted]; 19 Ariz. .....;

Superior & Pittsburg Copper Company vs. Tomich, 165 Pac. 1101; 19 Ariz. .....

If there is any justification for the enactment of such a law it must be found in the exercise of police power. This Court in passing upon the exercise of police power has repeatedly recognized the difficulty of applying any exact definition of that power. It is generally recognized as the right of a state to legislate for its general welfare and betterment. The extent to which the power may be exercised is dependent largely upon industrial and social conditions and to promote generally the health, safety and general welfare of the people. The line of demarcation is not always easy to distinguish or define. Each exercise must be measured of itself.

Noble State Bank vs. Haskell, 219 U. S. 104; 55 L. ed. 112;
Camfield vs. United States, 167 U. S. 518; 42 L. ed. 260.

It is, however, recognized that the police power can not be used in an arbitrary manner, and calculated to deprive one of private rights. So while that power "extends to all great public needs" those same public needs place a limitation upon its valid exercise. The rule of reason must be applied in all such exercises. Its exercises are various and based upon sound public policy and needs.

Hurtado vs. California, 110 U. S. 516; 28 L. ed. 232;
Hayes vs. Missouri, 120 U. S. 68; 30 L. ed. 578;

Missouri P. Ry. Co. vs. Mackey, 127 U. S. 205; 32 L. ed. 107;
Hallinger vs. Davis, 146 U. S. 314; 36 L. ed. 986;
Holden vs. Hardy, 169 U. S. 366; 42 L. ed. 780;
Barbier vs. Connolly, 113 U. S. 27; 28 L. ed. 923.

This Court has recognized that the police power cannot be used as an exercise for unjust and oppressive legislation.

Davidson vs. New Orleans, 96 U. S. 97; 24 L. ed. 616;
Yick Wo vs. Hopkins, 118 U. S. 356; 30 L. ed. 220.

The question presented then is whether the enactment of a law under the police power by a state is calculated to benefit the public needs. Whether such power is exercised to promote the health, safety and general welfare of the people. And the test to be applied is not the mere wording of the purpose, but whether in practice it would actually accomplish an object beneficial to the health, safety and general welfare.

> "The mere assertion that the subject relates, though but in a remote degree to public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid, which interferes with the general right of an individual to be free in

his person, and in his power to contract in relation to his own labor."

Lockner vs. New York, 198 U. S. 45; 49 L. ed. 937.

ARIZONA LAW NOT VALID EXERCISE OF POLICE POWER

We contend that the Arizona Employers' Liability Law is in no way designed to benefit either the health, safety or general welfare. It certainly is not designed to benefit the health or safety, as nowhere in the law or in the Arizona Constitution (Sec. 7, Art. 18) directing its enactment does there appear any provision designed to benefit the health or safety of employees of the stated occupations. It is true that the Arizona Constitution (Sec. 7, Art. 18) provides that "to protect the safety of employees * * * the Legislature shall enact an Employers' Liability Law," and it is true that Section 3157 of said law provides that employers shall, by rules, inform employees "as to the duties and restrictions of their employment." The law then proceeds to abrogate the common law rule of liability, by imposing unlimited liability upon employers, regardless of fault or negligence, but it is difficult to see in what manner such abrogation promotes or benefits the safety or health of the employees. We believe it quite obvious that no serious claim could be made that such law benefits either the health or safety of employees, re-

gardless of words intended to give such effect. Mere words alone are not sufficient. As to whether health or safety is benefited is measured by actual results that may reasonably be expected to follow from the enactment of a law. The law places no duty for the violation of which a penalty is imposed.

Can the law be said to be beneficial to public welfare. We admit that if it were designed to benefit the health and safety of employees it would be beneficial to public welfare. But it is not. We admit that if it removes existing ills in present social, industrial, or economic conditions in Arizona, it might, under certain circumstances, be beneficial to public welfare. But it does not. It adds to existing ills.

DO REASONS SUPPORTING WORKMAN'S COMPENSATION ACTS LEGALLY JUSTIFY ARIZONA EMPLOYERS' LIABILITY LAW

We submit that if any justification can be found for the legality of Arizona Employers' Liability Law, it must be upon reasons supporting the legality of Compulsory Compensation Acts. And it is solely upon such grounds that the Arizona Supreme Court attempted to find justification for its legality.

Inspiration Consolidated Copper Company vs. Mendez, 166 Pac. 278; 19 Ariz. .....;

Superior & Pittsburg Copper Company vs. Tomich, 165 Pac. 1101; 19 Ariz.

We assume that the decisions of this Court in the following cases cover the field of justification for enactment of Compensation Laws. And if there is justification for the legality of the Arizona Employers' Liability Law, it must be found in the reasons therein given:

New York Cen. R. R. Co. vs. White, 243 U. S. 188;

Hawkins vs. Bleakely, 243 U. S. 210;

Mountain Timber Co. vs. Washington, 243 U. S. 219.

The decisions in those cases are influenced by the consideration that the legislature in the enactment of those laws, substituted a substantial equivalent. Justice Pitney in the White case said that certain common law defenses could be completely abolished without violating any fundamental right of the employer or the law of the land, and cites a number of cases supporting that view, but adds "there were reasons rendering the particular departure appropriate," and "Nor is it necessary * * * to say that a state might, without violence to the constitutional guaranty of 'due process of law' suddenly set aside all common law rules respecting liability as between employer and employee, without providing a *reasonably just substitute,*" and "it perhaps may be doubted whether the State could abolish all rights of action, on the one hand, or

all defenses on the other, without *setting up something adequate in their stead.*" (Italics mine.) States in the valid exercise of police power have imposed liability upon employers regardless of fault or negligence. Such exercise of police power has been through the enactment of Workmen's Compulsory Compensation Acts. In all such enactments the liability imposed is not unlimited, and there has been in every such exercise a substituted equivalent in the form of a definite, reasonable and limited compensation for injury or death. If we are correct in our interpretation of the decisions of this Court interpreting such Workmen's Compulsory Compensation Acts, the abrogation of the Common Law rules of liability is only justified, and can only be supported by the fact that there was substituted a definite, reasonable and limited compensation.

Our quarrel with the Arizona Employers' Liability Law is not altogether that it abrogates the common law rules of liability as that it absolutely fails to set "up something adequate in their stead." "This Court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow servant rule and other common law rules affecting the employers' liability for personal injuries to the employee." (White case.) And in the White case the Court approved the New York statute doing away with the common law

doctrine of employers' liability for negligence, but only because a reasonable, substantial remedy was substituted, consonant with a more enlightened policy in the adjustment of injury problems between employer and employee.

We submit that the Arizona Employers' Liability Law cannot be justified upon any of the grounds supporting the legality of Compensation Acts. And "we are brought to the question whether the method * * * that is established as a substitute transcends the limits of permissible state action," and "whether the new arrangement is arbitrary and unreasonable from the standpoint of natural justice." (White case.) In the first place the Arizona Employers' Liability Law is not a "method of compensation." It is a suit for damages, and so expressly states. It does not relieve the employer from responsibility for damages measured by common law standards, by requiring "him to contribute a reasonable amount and according to a reasonable and definite scale, by way of compensation for loss of earning power," but on the contrary preserves all the attendant evils of the common law system, with the added burden of arbitrary liability regardless of fault. It preserves the jury system of awarding damages in an unlimited amount, not compensation, and should the employer be presumptious enough to appeal, he is what might be

called fined, by being assessed interest on the judgment at 12 % from date thereof. It surely cannot be said to be a substituted system which makes possible *definite* or *reasonable* awards for injuries.

This Court was quick to suggest in the White case that "this of course, is not to say that any scale of compensation, however insignificant on the one hand, or onerous, on the other, would be supportable." The New York law there under consideration was not pronounced arbitrary and unreasonable, for the reason that in that law the compensation was moderate and definite. The Arizona Employers' Liability Law provides for unlimited *damages*. No element of *compensation* enters into that law. If the history of litigation thus far had under it, is any criterion of the future, we can never expect awards to be *moderate*. Neither will the judgments be *definite*, in that one jury may award One thousand dollars for the loss of a finger, while another may award Eight thousand dollars.

It has been suggested in the cases now pending before this Court that in Arizona the people can be divided into two classes; the employer and the employee, with the latter class greatly predominating. There is not that great middle class found in older and more developed states, where the industries and occupations are more diversified. Hence Arizona juries are composed largely and sometimes entirely of men employed in mines or

smelters, notoriously prejudiced against employers of labor. Nine can return a verdict. Some suits have more of the nature of a criminal proceeding than that of a civil suit. And a jury is entitled, under the provisions of the law, to indulge its every whim. The New York compensation law provided for "compensation for the loss of earning power." The Arizona Employers' Liability Law provides for damages not alone for loss of earning power, but for pain, suffering, mental and physical anguish, and humiliation, and the jury is quick to consider all such elements.

See dissenting opinion Judge Ross. *Superior & Pittsburg Copper Company vs. Tomich,* 165 Pac. 1186.

We would ask that the Arizona Employers' Liability Law be borne in mind while considering the following and compare its operation and effect to the policy sought in Compensation Acts:

> "In the enactment of the compensation law the legislature recognized that the common law remedies for injuries sustained in certain hazardous industries were inadequate, unscientific and unjust, and therefore a substitute was provided by which a more *equitable adjustment* of such loss could be made under a system which was intended largely to *eliminate controversies and litigation.* * * *" (Italics mine.)
>
> *McRoberts vs. National Zinc Company,* 144 Pac. 247 (Kan.)

"It has endeavored by this law to provide a way by which employer and employed may, if they so choose, escape entirely from that very troublesome and economically absurd luxury known as 'Personal Injury Litigation,' and resort to a system * * * *without a law suit and without friction.*" (Italics mine.)

Borgnis vs. Falk Co., 133 N. W. 209; 37 L. R. A. (NS) 489, at page 493; 147 Wis. 327.

"The principal objects to be attained in a workman's compensation act are: 1. To furnish *certain, prompt* and *reasonable compensation* to the injured employee." (Italics mine.)

Legislative Commission of Wisconsin.

"The administration of justice today is clogged in every court, by the great number of suits for *damages for personal injuries.* The settlement of such cases by this system will serve to reduce the burden of our courts one-half by taking the cases out of court and disposing of them by this short cut." (Italics mine.)

President Taft in his message to Congress, submitted the Federal Act, 1912.

"It (the Washington Act) is founded on the basic principle that certain defined industries called in the Act, Extra Hazardous, should be made to bear the financial losses, sustained by the workmen engaged therein, through personal injuries, and its purpose is to furnish a remedy that will reach every injury sustained by

a workman engaged in any such industries, and make a *sure and certain award* therefor, bearing a *just proportion to the loss sustained,* regardless of the manner in which the injury was received." (Italics mine.)

State ex Rel Davis-Smith Company vs. Clausen, 65 Wash. 156; 117 Pac. 1101, page 1114.

The report of the Federal Commission recommending to the President and Congress, the Federal Workman's Compulsory Compensation Law, said:

"It may well be argued that legislation which puts upon the employer this naked burden, irrespective of fault, without the compensating circumstances of being relieved in any other direction, is so *arbitrary and unreasonable* as to fall within the inhibition of the fifth amendment against the deprivation of property without due process of law." (Italics mine.)

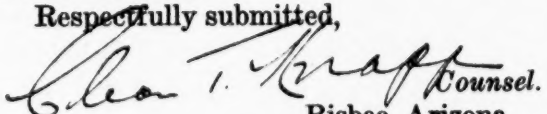
Page 63, Report.

Can it be said that the Employers' Liability Law was aimed to remedy the evils above set forth? Does it give to the employer any benefit in return for additional burdens?

In conclusion. No evil attendant upon the old personal injury litigation has been removed by the Arizona Employers' Liability Law. The law's delay, the court expense, the large attorney fee, the oftimes miscarriage of justice by inadequate verdicts, and more often by excessive verdicts, the bitterness growing

from litigation; all these and many more are still attendant upon the trail of this law. Every reason prompting the enactment of compensation laws is lacking to support this law. It is not designed in the remotest way to protect health, safety or public welfare. It is not a valid exercise of police power. The Arizona Supreme Court vainly searched for authorities to justify the constitutionality of the law, and was forced to base its decision entirely upon the reasons given in the White case upholding the New York Compensation Law. If Arizona can legally adopt such a law, every state can do so, and litigation would become so much more inviting than under the now difficult common law practice, that Compensation Laws would in many states become obsolete or practically inoperative. Personal injury litigation would be reborn. The law should be held void.

Respectfully submitted,



Counsel.

Bisbee, Arizona,

APPENDIX A

I. CONSTITUTION OF ARIZONA.

Article XVIII of the Arizona Constitution is entitled "Labor." Sections 4, 5, 6, 7 and 8 of that Article are as follows:

"Sec. 4. The common law doctrine of fellow servant, so far as it affects the lia-

bility of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"Sec. 5. The defense of contributory negligence or of assumption of risk shall in all cases whatsoever, be questions of fact and shall, at all times, be left to the jury.

"Sec. 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"Sec. 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or in any other industry the legislature shall enact an *Employers' Liability Law,* by the terms of which any employer, whether individual, association or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Sec. 8. The Legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be re-

quired to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workmen from any accident arising out of, and in the course of such employment is caused in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

II. EMPLOYERS' LIABILITY LAW.

This law was enacted by the Legislature, at its first Special Session held in 1912, shortly after the adoption of the Constitution, and now comprises Chapter VI, of Title 14 of the Revised Statutes of Arizona, 1913, entitled "Liability of employers for injuries to workmen in dangerous occupations." (Sections 3153 to 3162, inclusive.)

The relevant portions of the Act are as follows:

"Sec. 3153. This chapter is and shall be declared to be an Employers' Liability law, as prescribed in Section 7 of Article XVIII of the State Constitution.

"Sec. 3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said Section 7 of Article XVIII of the state constitution, any employer, whether individual, association or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

"Sec. 3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risk and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

"Sec. 3156. The occupations hereby declared and determined to be hazard-

ous within the meaning of this chapter are as follows:

"(1) The operation of steam railroads, etc.

* * * * * * * * * * *

"(8) All work in and about quarries, open pits, open cuts, mines, ore reduction works and smelters.

* * * * * * * * * * *

"(10) All work in mills, shops, works, yards, plants and factories where steam, electricity or any other mechanical power is used to operate machinery and appliances in and about such premises.

"Sec. 3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations and instructions inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

"Sec. 3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, services and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the em-

ployer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents and if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative, for the benefit of the estate of the deceased.

"Sec. 3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in Section 5 of Article XVIII of the state constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

"Sec. 3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 percent. per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

INDEX

LIST OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917

No. 822

SUPERIOR & PITTSBURG COPPER COMPANY, a corporation,
Plaintiff in Error,

vs.

FRANK TOMICH, sometimes known as FRANK THOMAS,
Defendant in Error.

Brief of Defendant In Error

STATEMENT

As stated in the brief of plaintiff in error, this case comes before this court upon the question of the constitutionality of the Employers' Liability Law of Arizona, (Chapter 6, Title 14, Revised Statutes of Arizona, 1913). The full text of the law is set forth in Appendix A to the brief of plaintiff in error, and it is not necessary to quote it herein.

The statement of the case in the brief of plaintiff in error fairly states the facts, except that the evidence does not show that defendant in error, "pushed his ore car into the dump-board"; but, on the contrary, the evidence tends to show that defendant in error was unable to hold the car back, owing to his having slipped on the foot-board between the car tracks.

ARGUMENT

In the brief filed herein by plaintiff in error, counsel raises the question as to whether or not the legislature of the state of Arizona had the authority to enact legislation holding the employer liable for injuries accurring to employees without any fault or negligence on the part of the employer. That question has been finally and definitely settled by this Court in the following cases:

Chicago R. I. & P. R. R. Co. vs. Zernecke, 183 *U. S.* 582;

New York Cent. R. R. Co. vs. White, 243 *U. S.* 187.

Mountain Timber Co. vs. Washington, 243 *U. S.* 217.

When it is once admitted that a state may enact legislation holding an employer liable to an employee for injuries occurring in the course of his employment, then, so far as this case is concerned, there remains but one other question to be decided, and that is: In what manner should the amount of liability be determined?

Counsel for plaintiff in error contends that courts

have sustained Workmen's Compulsory Compensation Acts because the amount which the injured employee could recover was either fixed by the law itself or by a commission appointed for that purpose, and argues that the Arizona Employers' Liability Law should be held unconstitutional because the amount of damages recovered is left to a jury. That the Liability Law leaves the amount of damages to be recovered to be determined by a jury surely cannot be ground for holding it unconstitutional. Such a provision in the Arizona law is simply a reenactment of the common law, and does not deprive the defendant of his constitutional right of trial by jury, which has been the objection to every Compensation Law enacted in the United States where the legislature fixed the amount an employee should receive in case of injury.

Ives Case, 201 *N. Y.* 271, 94 *N. E.* 431;

Green vs. Caldwell, 186 *S. W.* 648;

New York Cent. R. R. vs. White, Supra.

In view of this fact the Employers' Liability Law, by providing that the amount of damages that might be recovered by an injured employee should be determined by a jury in a proper case, avoid the very objection that has been raised in the cases above cited and in a number of other cases in which Workmen's Complusory Compensation Acts have been passed upon by different courts. In other words, the Arizona law does not deprive the employer of the right to have the issues arising out of the injury occurring to an employee tried by a jury, but simply deprives the employer of certain common law defenses,

such as the defense of assumption of risk, contributory negligence and the defense of the negligence of a fellow servant. That such defenses may be abolished by the legislatures of different states has been decided by this Court in the cases of New York Cent. R. R. Co. vs. White, supra; Mountain Timber Company vs. Washington, supra; and by numerous decisions of the state courts.

This court having decided that an employer may be held liable in damages to an injured employee for injuries occurring in the due course of his employment, notwithstanding the fact that the injuries occurred through no fault of the employer; and this Court having previously held that the common law defenses of contributory negligence, assumption of risk, and the defense of negligence of a fellow servant may be abolished without any violation of constitutional provisions contained in the Constitution of the United States, it is difficult to concede how this Court can hold the Employers' Liability Law unconstitutional merely because it leaves the amount of damages in a proper case to be determined by a jury. This objection is untenable; for when it is once decided that compensation for injuries may be allowed, the manner for fixing compensation is purely within the power of the legislature; and the Legislature of the State of Arizona has left that question to be decided by a jury, as was stated in the case of Western Indemnity Company vs. Pillsbury, 151 Pac. 404 (Cal), in which case the court said:

> "The essential question is whether liability for injury suffered by employees through acci-

dent may be imposed upon employers who have been guilty of no breach of duty. Once this question is answered in the affirmative, the mode of imposing the liability, whether it be by way of a proportionate contribution having some of the characteristics of a tax, or by fixing a direct liability upon each employer for each accident as it occurs, is a matter for legislative determination."

It may be true that the Arizona law is subject to criticism and that it does not contain the wise provisions of labor laws of other states. Possibly it would have been better for the state to have adopted a law similar to the Washington Compulsory Compensation Law or the New York law; but it is not within the province of this Court to inquire into the wisdom or judgment exercised by the Arizona Legislature in adopting the law in question.

> "But the courts are slow to inquire into the mere wisdom of a statute. This question is so pre-eminently one for the law-making branch of the government that the courts will interfere only where there can be no two opinions as to the mischievous and evil tendencies of the act."

State vs. Clausen, 177 *Pac.* 1119, (*Wash.*)

The Arizona law in question may be out of harmony with the spirit and purpose of laws of other states regulating the relations between employer and employe; but the wisdom and propriety of the passage of a law cannot and ought not be inquired into by the courts. Where the constitutionality of a law is questioned, the inquiry of the courts is limited to

the question: What provision of the Constitution does it violate?

Laws cannot be disregarded merely because they are supposed to be repugnant to some governmental principles that lie outside of constitutional limitations. The Constitution of the State of Arizona confines to the legislative branch the authority to enact an Employers' Liability Law, and this authority the judicial branch is not at liberty to interfere with, unless the Legislature violates directly, or by necessary implication, some provision of the State or United States Constitution. Subject to this limitation the policy of the legislation or the wisdom of the propriety of it is not for the judicial branch of the government to decide.

Commonwealth vs. Goldberg, 180 *S. W.* 72 (*Ky.*)

While the Arizona Employers' Liability Law may be subject to some just criticism, any plan devised by the wit of man may, in special cases, work unjustly; but the act is to be judged by its general scope and plan, and if the underlying principle is within the province of the Legislature, it should not be held unconstitutional because it is not as good as similar laws of some of the other states.

Respectfully submitted,

Samuel Herri